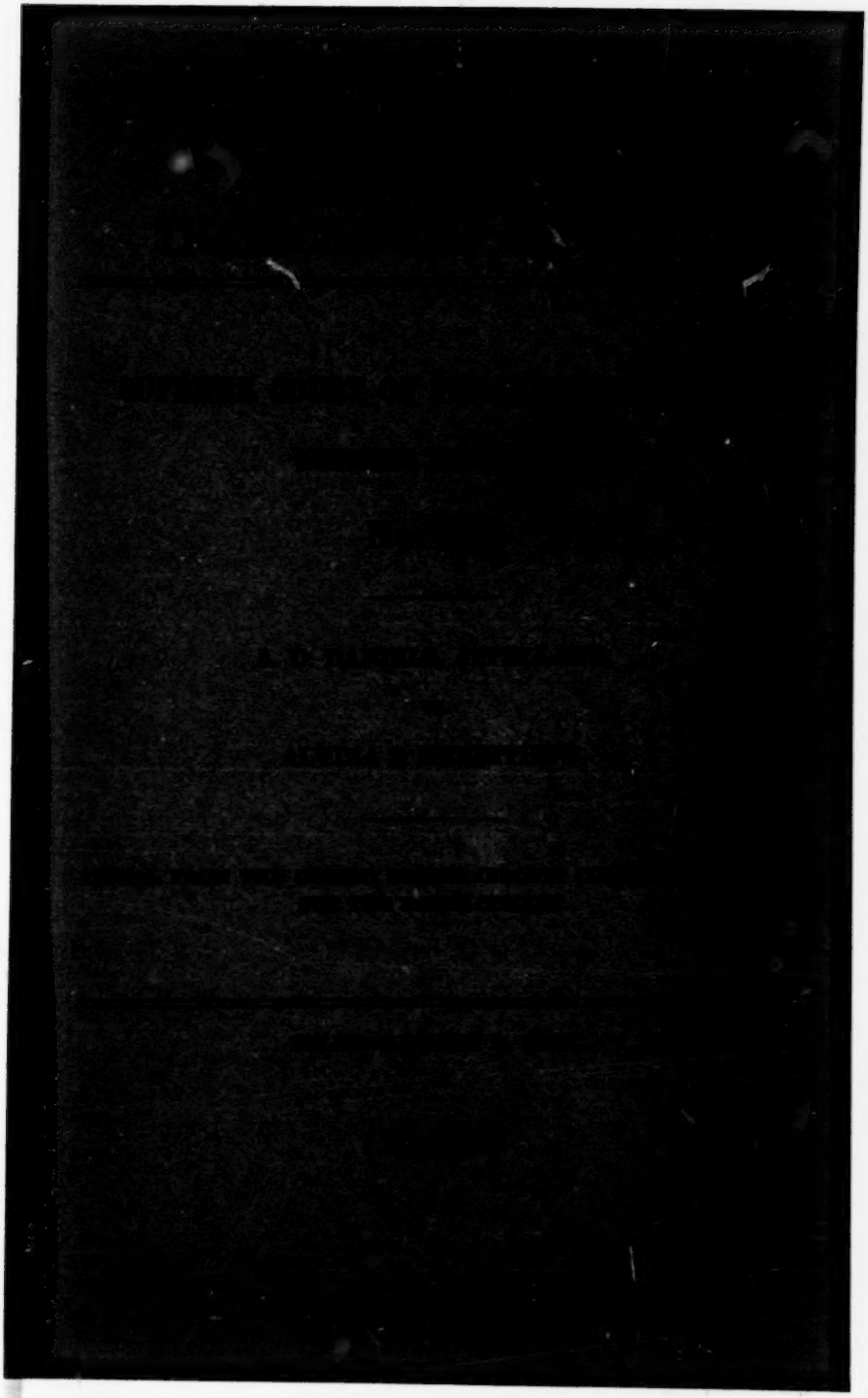

(23,818)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 667.

A. D. DANIELS, APPELLANT,

vs.

ALVINA S. MERRITHEW.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 25, 1913.

No. 2215

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

ALVINA S. MERRITHEW,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon

TRANSCRIPT OF RECORD.

LODGED

JAN - 2 1913

F. D. MONCKTON,
CLERK.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

ALVINA S. MERRITHEW,

Appellee.

Names and Addresses of Attorneys Upon This Appeal:

For the Appellant:

PLATT & PLATT and HUGH MONTGOMERY,
Board of Trade Bldg., Portland, Oregon

For the Appellee:

ARTHUR I. MOULTON,
P. A. LAFFERTY,
Fenton Bldg., Portland, Oregon

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In the District Court of the United States for the District of Oregon.

Be it Remembered, That on the 4 day of May, 1912, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Bill of Complaint, in words and figures as follows, to wit:

[Amended Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

ALVINA S. MERRITHEW,

Defendant.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF OREGON:

A. D. Daniels, a citizen and inhabitant of the state of Wisconsin, residing at Rhinelander in said state, with leave of court first had and obtained, brings this, his amended bill of complaint, against Alvina S. Merrithew, a resident and inhabitant of the State of Oregon, residing at Gresham, in said state.

And thereupon your orator complains and says:

I.

That at all times herein mentioned plaintiff was and is a resident and inhabitant of the State of Wisconsin, residing at Rhinelander in said state.

II.

And thereupon your orator further shows unto your Honors:

That at all times herein mentioned defendant, Alvina S. Merrithew, was, and is, a resident and inhabitant of the State of Oregon, residing at Gresham in said state.

III.

And thereupon your orator further shows unto your Honors:

That on the 12th day of April, 1902, an dimmediately prior thereto, one Aztec Land and Cattle Company, Ltd., a corporation, was the owner in fee simple, free of any lien or incumbrances, of that certain property located in the Territory of Arizona, and particularly described as follows, to wit:

> All of section twenty-five, twenty-seven, and twenty-nine, township sixteen north, range ten east, and the southeast quarter of section three, township nineteen north, range nine east G. & S. R. M., Arizona,

and was the owner in fee simple of said property described in paragraph III of this amended complaint, up until the 2nd day of February, 1904.

IV.

And thereupon your orator further shows unto your Honors:

That on or about the 12th day of April, 1902, the said described lands, mentioned in paragraph III of this amended bill of complaint, were included within the limits of the San Francisco Mountains Forest Re-

serves, pursuant to a proclamation of the President of the United States made on or about the 12th day of April, 1902, which said lands were then, and still are, non-mineral lands.

V.

And thereupon your orator further shows unto your Honors:

That on or about the 8th day of February, 1904, that certain property situated within the District of Oregon, located in the County of Klamath in the State of Oregon, and particularly described as follows, to wit:

> The southeast quarter of the northeast quarter; the north half of the southeast quarter; the southeast quarter of the southeast quarter of section eleven, township thirty-seven south, range ten east of the Willamette Meridian,

was surveyed, unappropriated, and vacant public land of the United States, returned and characterized upon the official records of the United States as non-mineral land, free and open to entry and settlement under and in accordance with the laws of the United States governing the acquisition of public lands.

VI.

And thereupon your orator further shows unto your Honors:

That on or about the 4th day of June, 1897, the Congress of the United States passed an act entitled: "An act making appropriation for sundry civil expens-

es of the government, for the fiscal year ending June 30, 1898, and for other purposes:" which act provides, among other things, as follows, to wit:

> "That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the tract selected: Provided, further, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claim."

VII.

And thereupon your orator further shows unto your Honors:

That, on the 2nd day of February, 1904, the said Aztec Land and Cattle Company, Ltd., a corporation, did, in accordance with the provisions and requirements of the act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, relinquish and convey unto the United States of America those certain tracts of land hereinbefore described in

paragraph III of this amended complaint, and recorded the deed of conveyance in the office of the recorder of the county in which the lands are situated, and subsequently, and on or about the 8th day of February, 1904, filed with the Register and Receiver of the United States land office at Lakeview, Oregon, the said deed so recorded, together with a full, true, and corrrect abstract of title of the lands so relinquished, duly certified as such by the county recorder of the county in which the lands are situated, which abstract of title showed it to be the owner in fee simple of said lands, free and clear of any lien or incumbrances, immediately prior to the time the deed to the United States was recorded, and thereupon and at the same time selected in lieu of said lands so relinquished,

> The southeast quarter of the northeast quarter; the north half of the southeast quarter; the southeast quarter of the southeast quarter of section eleven, township thirty-seven south, range ten east of the Willamette Meridian,

together with other lands, which selection so made was prior in time to the selection or entry of any other person or persons whomsoever, and, by virtue of said selection, there was initiated a right and interest prior in time and superior in right as against all persons whomsoever.

VIII.

And thereupon your orator further shows unto your Honors:

That regardless of said selection so made as alleged in paragraph VII of this amended complaint, the defendant did, on the 13 day of June, 1904, attempt to make a timber and stone entry upon the land described in paragraph V of this amended complaint.

IX.

And thereupon your orator further shows unto your Honors:

That on or about the 28th day of June, 1902, the state of Oregon filed upon the said tracts so selected, together with certain other lands, certain instruments purporting to be school indemnity lists, which lists were numbered lists 178 and 188, respectively, which said lists were duly and regularly accepted and filed by the Register and Receiver of the United States land office at Lakeview, Oregon, and thereupon were regularly transmitted to the Commissioner of the General Land Office of the United States government at Washington, D. C., to await the acceptance and approval of the land department of the United States government, but that, owing to the invalid character of the base lands tendered in said lists, the said lists were held for cancellation, and were subsequently cancelled upon relinquishments of said lists filed on behalf of the state of Oregon, on the 8th day of February, 1904.

X.

And thereupon your orator further shows unto your Honors:

That prior to the said cancellation of said school indemnity lists 178 and 188, and before any action what-

soever had been taken by the proper officers of the land department of the United States, except said Register and said Receiver, relative to the acceptance and rejection of the said indemnity lists, the State of Oregon, acting through the officers of the Oregon state land board, sold to various bona fide purchasers, for value, the timber lands upon which the said school indemnity lists 178 and 188 had been filed, and the said state had not at the time of such sale, nor has it at any time since ever acquired or owned any right, title, or interest in or to the said lands upon which the said lists were filed, including those lands more particularly described in paragraph V of this amended bill of complaint, which said lands described in said paragraph V were, for a valuable consideration, and in good faith, and without any knowledge whatsoever of the irregularity of the proceedings which had taken place in connection with the sale thereof, or of the invalid character of the base lands which were tendered to the Federal government as the basis for the said selection by the State of Oregon, purchased from the said State of Oregon by the plaintiff herein.

XI.

And thereupon your orator further shows unto your Honors:

That subsequently and upon the discovery of the fact that all the proceedings in connection with the attempt to acquire said lands by filing of said lists 178 and 188, so filed as aforesaid, and more particularly

those lands hereinbefore described in paragraph V of this bill of complaint, were irregular, and that by virtue of the filing of said lists the State of Oregon had acquired no interest and did not then have any right, title, or interest in or to the said lands so selected, owing to the invalid character of the base land which had been tendered in exchange therefor, and the further fact that the said selected land had, nevertheless, been sold by the State of Oregon to many innocent purchasers for value, the State of Oregon, acting through the Honorable George E. Chamberlain, its governor, entered into negotiations with the Department of the Interior of the United States, for the purpose of arriving at some arrangement wherein and whereby the interest of these bona fide purchasers from the state might be protected, and as a result of such negotiations, and on or about the 17th day of October, 1903, a letter was promulgated and transmitted to the governor of the State of Oregon by the Honorable Secretary of the Interior of the United States, of which letter the following is in part substantially a copy, to wit:

> "It (the state) may within sixty days allowed for appeal amend its selection by the substitution of a valid base, or, if unable to furnish such a base, it may, upon receipt of notice that the selection is held for cancellation, make a formal relinquishment of the selection, and give same to its grantee. While the selection is of record uncancelled the land is segregated thereby, and no right

can be acquired by the presentation of an application therefor (29 L. D. 29), but the purchaser holding the state's relinquishment may present it with his application, and thereby secure the right of entry."

XII.

And thereupon your orator further shows unto your Honors:

That thereafter and in accordance with the terms of the arrangement thus agreed upon, as evidenced by the said letter of the secretary of the interior, the said lieu selection so made as alleged in paragraph VII of this amended bill of complaint was made by the said Aztec Land and Cattle Company, Ltd., a corporation, acting by A. L. Veazie, its attorney in fact, in the interest and for the benefit of the plaintiff herein, and for the purpose of protecting the interests of the plaintiff in and to said selected land acquired by virtue of the purchase so made by the plaintiff from the State of Oregon, as alleged in paragraph X of this amended complaint, and at the time of making said lieu selection so made as alleged in said paragraph VII, and on the 8th day of February, 1904, the said lieu selector, Aztec Land and Cattle Company, Ltd., a corporation, acting by A. L. Veazie, its attorney in fact, presented, simultaneously with and together with the selection as in paragraph VII of this amended complaint alleged, a relinquishment from the State of Oregon of all its right, title and interest in and to the said selected land, which said relinquishment was made by the State of Oregon in the interest and for the bene-

fit of the plaintiff herein, as grantee, which relinquishment is the same relinquishment referred to in paragraph IX hereof.

XIII.

And thereupon your orator further shows unto your Honors:

That the said forest lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, was in all respects regular and in accordance with the requirements of said act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, and in accordance with the requirements of the Secretary of the Interior in his letter of October 17, 1903, hereinbefore set forth in paragraph XI of this amended bill of complaint, and the local officers of the United States land office at Lakeview, Oregon, did, on the 8th day of February, 1904, accept and file the said lieu selection, so made as aforesaid in paragraph VII of this amended bill of complaint, and did no the 4th day of March, 1904, and at subsequent dates, attempt to reject said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, and stated , as a basis for said attempted rejection, that the said lieu selection was in conflict with certain homestead and timber and stone applications, which were made subsequently to the 8th day of February, 1904, and subsequently to the presentation and filing of the lieu selection, together with the relinquishment of the State of Oregon, as alleged in paragraphs VII and XII of this amended bill of complaint.

XIV.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 8th day of April, 1904, said lieu selector and the plaintiff herein, together with other lieu selectors who had made other selections in the interest and for the benefit of the plaintiff herein, appealed from the ruling of the local officers of the United States land office at Lakeview, Oregon, by which ruling the said local officers attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, upon which appeal the said ruling was affirmed by the Commissioner of the General Land Office at Washington, D. C., on or about the 30th day of March, 1905, and subsequently and on or about the 25th day of October, 1905, the Honorable Secretary of the Interior of the United States, acting through the Honorable Frank Pierce, first assistant secretary, reversed the said decision and ruling of the Commissioner of the General Land Office, and directed that said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections similarly made, be allowed as of the date on which they were filed, to wit: the 8th day of February, 1904, and directed the Register and Receiver of the United States Land Office at Lakeview, Oregon, to allow said selections to remain of record as filed.

XV.

And thereupon your orator further shows unto

your Honors:

That subsequently and on or about the 6th day of December, 1905, the local officers of the United States Land Office at Lakeview, Oregon, attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections, and alleged as a ground for said attempted rejection that the land covered by said selections had been withdrawn for the purpose of what was known as the Klamath River Project, and said action of the said Register and Receiver of the United States Land Office at Lakeview, Oregon, in attempting to reject said selections, was subsequently reversed by order and direction of the Commissioner of the General Land Office, made on the 23rd day of January, 1906, who ordered and directed that said lieu selection be allowed as of date February 8th, 1904.

XVI.

And thereupon your orator further shows unto your Honors:

That on or about the 5th day of March, 1906, and the 11th day of June 1906 the Register and Receiver of the United States Land Office at Lakeview, Oregon, made objections to the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, and attempted thereby to reject said lieu selection referred to in paragraph VII of this amended complaint, which attempted objections were sustained on appeal by the Commissioner of the General Land

Office and by the Department of the Interior, on the 20th day of June, 1906, and subsequently and on or about the 15th day of May, 1907, the Department of the Interior of the United States recalled its attempted decision of June 20th, 1906, and entered an order directing the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, as of the date on which said lieu selections were filed, to wit: the 8th day of February, 1904, and ordered and directed that notice of such order be given to all parties who had made entries upon said lands subsequently to the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, which said notice was duly given as directed.

XVII.

And thereupon your orator further shows unto your Honors:

That subsequently, and as a result of the notice so given, a petition for a review of the departmental decision last referred to was filed on behalf of one Archie Johnson, a claimant of part of the said lands embraced by said indemnity lists 178 and 188, which petition set forth the existence of an alleged conspiracy, averred to have been formed for the purpose of acquiring all of the said lands, in the first instance, and that the said lieu selection, so made as aforesaid, was in accordance with, and constituted a part of, said alleged conspiracy, and that the plaintiff herein was not a purchaser in good faith of said land described in paragraph V of this amended complaint, or any part there-

of, which petition for review was allowed, upon the ground that all previous hearings before the Department of the Interior, so had as hereinbefore alleged, were purely ex parte and were, consequently, not proper proceedings in which to determine the merits of the adverse claims to the lands in question, for the purpose of basing a final decision thereon, and, therefore, an order was made directing that a final hearing should be held before the Register and Receiver of the United States land office at Lakeview, Oregon, for the purpose of determining the respective merits of various claims to the lands embraced within the said school indemnity lists 178 and 188.

XVIII.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 25th day of May, 1908, said hearing so ordered, as aforesaid, was duly and regularly had before the Register and Receiver of the United States land office at Lakeview, Oregon, the plaintiff herein appearing in person and by attorneys, and the defendant and other adverse claimants appearing in person or by attorneys, at which time the said Register and Receiver, after duly hearing the respective parties, attempted to hold that the various homestead and timber and stone entries hereinbefore referred to in paragraph XIII of this amended complaint and particularly the entry of the defendant which was made on the 10th day of January, 1905, should be allowed, which decision was subsequently, and on or about the 13th day of April,

1909, reversed by the Honorable Commissioner of the General Land Office, who held that the lieu selection referred to in paragraph VII of this amended complaint, together with other selections made in the interest of the plaintiff herein, had been duly and regularly made, and should be allowed to remain intact upon the records of the United States Land Office, as of the date on which they were filed, to wit: February 8th, 1904.

XIX.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the ..... day of .....' 19....., an appeal from the decision of the Honorable Commissioner of the General Land Office, hereinbefore referred to in paragraph XVIII of this amended complaint, was taken by certain alleged homestead and timber and stone claimants, including the defendant, to the Department of the Interior of the United States, which department, acting through the Honorable Frank Pierce, its First Assistant Secretary, found that the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, were filed simultaneously with the relinquishment and cancellation of said indemnity lists 178 and 188, to wit: on the 8th day of February, 1904, and before the attempted filing of the said alleged homestead and timber and stone entries, so made as alleged in paragraphs VIII-XIII of this amended complaint, and further found that the record then before

said department fully showed, and every material fact supported the conclusion, that the plaintiff herein was a purchaser in good faith, free from fraud of any kind, and that the said alleged homestead and other entries, and particularly the entry of the defendant, were made subsequently to the 8th day of February, 1904, and after the filing of the lieu selection, so made as alleged in paragraph VII of this amended complaint, and that said lieu selection, so made as alleged in paragraph VII of this amended complaint, had been allowed by the Secretary of the Interior, as alleged in paragraphs XIV and XVI of this amended complaint, and had been allowed by the Commissioner of the General Land Office, as alleged in paragraph XV of this amended complaint, and, based upon said findings, held that it was within the competency of the officers of the land department of the United States to allow the said alleged homestead and timber and stone entries to be made after the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, and the allowance of said selection, so made as alleged in paragraphs XIV and XV and XVI of this amended complaint, and further held that said lieu selection, so made as allowed, would be denied in all instances where the local officers of the United States Land Office at Lakeview, Oregon, had attempted to allow homestead and timber and stone entries to be made, a copy of which decision is hereunto attached and marked "Exhibit A", and, by reference, incorporated in and made a part of this amended complaint.

XX.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 14th day of July, 1910, and in accordance with the ruling of the decision herein referred to in paragraph XIX of this amended complaint, a patent to the following described lands, situated in the County of Klamath and State of Oregon, and particularly described as follows ,to wit:

> The southeast quarter of the northeast quarter; the north half of the southeast quarter, and the southeast quarter of the southeast quarter of section eleven, township thirty-seven south, range ten east of the Willamette Meridian;

was issued in the name of Alvina S. Merrithew, the defendant herein, contrary to, and in violation of, the rights and equities of the plaintiff herein, and that the said patent so issued, as aforesaid, was issued by the officers of the United States government without regard to, and in contravention of, the vested rights of the plaintiff herein, and in accordance with the ruling of the Department of the Interior, as evidenced by the decision referred to in paragraph XIX of this amended complaint.

XXI.

And thereupon your orator further shows unto your Honors:

That this is a suit between citizens of different states, and that the amount in controversy herein ex-

ceeds the amount of three thousand ($3000) dollars, exclusive of interest and costs.

XXII.

And thereupon your orator further shows unto your Honors:

That he has no plain, adequate, or speedy remedy at law, but only in equity.

WHEREFORE, and forasmuch as your orator is remediless in the premises, under and by strict rules of common law, and can only have relief in a court of equity where matters of this nature are recognizable and reviewable, files this, his amended bill of complaint, and prays:

I. That the defendant may be adjudged and decreed to hold said lands described in paragraph V in trust for your orator, and to convey the same to your orator, and deliver to your orator any patent or other deeds of the same in her possession, and be restrained and enjoined from hereafter setting up any claim or title to said lands or any part thereof, or in any manner intermeddling therewith, or removing any timber or other product therefrom.

II. That the defendant may be adjudged and decreed to hold any timber or other product by her or her servants or agents removed from said land, or the proceeds or manufactured product from the same, in trust for your orator, and may be decreed to account to your orator for the same, or the value thereof, and to repay to your orator said value, with interest from the date of sale, if the same has been sold by the said defendant.

III. That upon the failure of the defendant to make said conveyance and to deliver to your orator any patent or other deeds of the said lands described in said paragraph V, within a period of thirty days from the entry of the decree of this court, the said decree be adjudged and decreed to stand as a conveyance in lieu of such patent or other deeds.

IV. And your orator further prays: That your Honors may grant unto your orator a writ of subpoena of the United States issued out of and under the seal of this Honorable Court, directed to the defendant, Alvina S. Merrithew, therein and thereby commanding said defendant, under a certain penalty therein to be named, personally to be and appear before your Honorable Court, then and there to answer, all and singular, (but not under oath, answer under oath being expressly waived), the matters and things aforesaid, and to stand and abide by and sustain such direction and decree as shall be made herein, as to your Honors shall seem equitable and just.

V. And your orator prays for such further relief in the premises as the nature and circumstances of this cause may require and to your Honorable Court may seem reasonable and proper.

And your orator, as in duty bound, will ever pray.

A. D. DANIELS,

By Platt & Platt and Hugh Montgomery, His Solicitors.

Hugh Montgomery,

of Counsel.

[Exhibit "A"]

D. C. M. G. B. G.

DEPARTMENT OF INTERIOR.

Washington, Feb. 17, 1910.

E--900.

Aztec Land & Cattle Company, Lt'd.
E. B. Perrin
Lieu Selectors,
A. D. Daniels,
Claimant of Beneficial Interest,
vs.
Archie Johnson, et al,
Intervenors.
The Commissioner
Of the General Land Office.

Sir:

This is the appeal of Archie Johnson, et al., intervenors, from your office decision of April 13, 1909, sustaining the claim of A. D. Daniels, beneficiary under Lieu Selections, Nos. 15016, 15017 and 18, (Serials 0714, 0715, 0716) for certain described lands in the Lakeview Land District, Oregon. Questions affecting the validity of these selections have been subject of numerous decisions of the Land Department, and a detail statement of such proceedings covering a period of more than eight years, must of necessity be set out

in detail, if the issues now presented may be properly understood.

January 28, 1902, the lands involved were selected by the State of Oregon, per school indemnity lists Nos. 178 and 188 these lists were held for cancellation by your office, because of invalid base, and were finally cancelled in March and August, 1904, upon relinquishments filed on behalf of the state. The date of the filing of these relinquishments is one of the disputed questions in this record: and while not necessarily controlling, it is in view of this case important, and will be considered on its merits in the progress of this paper.

For present statement, it will be enough to say that the local officers and your office have found that it was filed Feb. 10, 1904, whereas it is claimed on behalf of A. D. Daniels, owner of the Beneficial interest in certain Forest Lieu Selections of these same lands, that it was filed Feb. 8, 1904. However this may be, the Forest Lieu Selections in question were filed on said last named date Feb. 8, 1904, but were rejected by the local officers in a letter to one, L. T. Barin, March 4, 1904, for conflict with certain homestead and timber and stone applications for part of the same lands, These Forest Lieu Selections were filed by Barin in the name of Edward B. Perrin, and Aztec Land and Cattle Co. but the said A. D. Daniels was the beneficial owner of the scrip, which was filed in his interests to protect his purchase from the state under its aforesaid Invalid Indemnity Selections.

On appeal, your office affirmed the action of the

Register and Receiver, giving as further reason and justification thereof the fact, that the Lieu Selections were presented at the local land office prior to cancellation of said Indemnity School Selections, and even prior to the filing of the state's relinquishment. Upon appeal, however, from this action of your office, the Department, Oct. 25, 1905, reversed your office decision, stating while the appeal was pending an affidavit had been filed by A. D. Daniels in which he stated that he was the real party in interest and the equitable owner of the lands assigned as bases for the Lieu Selections; that after its selections of the lands as School Indemnity, the State of Oregon had sold them to sundry purchasers, who paid part of the purchase price and assigned the certificates of sale to him, and he was then the owner thereof; that he thereafter became doubtful as to the validity of the State selection, and in order to protect his interests obtained relinquishments from the State and caused them to be filed in the Local Land Office at Lakeview with Lieu Selections; that in so doing he relied upon your office report of Oct. 13, 1904, (1903) to the Secretary of the Interior; which report was transmitted by the Department to the Governor of Oregon Oct. 17, 1904 (1903).

Considering the appeal, the Department held that the case, was controlled by its decision in the California and Oregon Land Company, (33 L. D. 595), that this case was in all essential respects the same as that one, and remanded the case with directions to adjudicate it thereunder. The Lieu Selections having

been returned to the Register and Receiver for allowance in accordance with said decisions, they were again, on Dec. 6, 1905, rejected by the local officers, for the reason that the lands had been withdrawn by telegram of June 25, 1904, for the Klamath River project. This action of the Register and Receiver was reversed by your officer Jan. 23, 1906, and the selections were remanded to be entered of record as of date Feb. 8, 1904, the day on which they were originally presented, if no other objection appeared. Under dates of March 5, and June 11, 1906, the Register submitted full reports to your office upon the said applications; and stated there were objections to the allowance of the same, in that there were various homesteads and timber and stone applications which had been allowed subsequently to the cancellation of the state's list. The Register also referred to the fact that Daniels had caused a contest to be instituted against the State's selection, and questioned his good faith in the matter.

Separate appeals were taken by the Aztec Land and Cattle Company and Perrin from this action of the local officers, and the papers in connection with the application of the Aztec Company were transmitted to the Department by your office, letter of May 9, 1906, for further consideration in connection with the report of the local office.

Upon sonsideration of the matter thus presented, the Department held in its decision of June 26, 1906, that the facts failed to show that Daniels, was entitled to protection as a Bona Fide purchaser from the

state; that the State's selections were filed Jan. 28, 1902, while the lands were sold on Jan. 21st, preceding, at which they were public lands of the United States, and no one purchasing them could claim to be a Bona Fide purchaser from the State; that as late as Oct. 5, 1903, Daniels was not asserting that he was a purchaser in good faith from the State, but was acting adversely to it and attempting to contest the lists under which he later asked for recognition as a Bona Fide purchaser and for equitable relief; that this position then was inconsistent with the position later assumed: and if had since acquired assignments of the State's certificates of sale, he had done so with full knowledge of the invalidity of the State's claim; that the facts set forth above were fatal to his contention that he was a Bona Fide purchaser, and as such should be permitted to file the State's relinquishment and obtain precedence over others seeking to appropriate the lands under the General land laws; that to conceed to him this privilege under letters Oct. 17 & 13, 1903, mentioned above, would in effect, be to make such persons as from time to time might constitute the State Land Board, agents to dispose of the public lands of the United States, within the State, to such persons as they might favor by means of sales of public land as state land, the subsequent filing of the State's list invalid for want of sufficient base; the filing of the State's relinquishment, and the protection of the purchaser from the state by grace of the Land Department. The Department accordingly held in that decision that the lieu selection should be rejected.

A motion for review of said decision of June 26th, 1906, having been filed by Daniels, Department, on May 15 and 18, 1907, rendered decisions holding that while Daniels, was not, strictly speaking a Bona Fide purchaser from the State, because the Certificates of sale issued by the State antedated the filing of the School Indemnity Selections, and therefore were made at a time when there was no actual claim of the State pending, still Daniels had not purchased the land until the month of April, 1902, nearly three months after the lands had been actually selected by the State, and that having paid a valuable consideration for the lands in an honest belief that a title was being obtained, that was sufficient to constitute a Bona Fide Purchase.

The decision of June 26th, 1906, was therefore recalled, and it was ordered that the Lieu Selection should be reinstated.

In promulgating the decision last mentioned, your office returned the Lieu Selections to the Local Land Office for allowance, and instructed the Register and Receiver to notify all parties who had made entry of said lands subsequently to the cancellation of the State's list to show cause within sixty days why their entries should not be cancelled, because of conflict with said Lieu Selections as a result of which a petition termed, a motion for re-review of Departmental decisions of May 15, and 18, 1907, was filed on behalf of Archie. Johnson who claimed a part of the Lands under a sale made thereof under the Public Land Laws.

This petition or motion charged, in effect, that a conspiracy had been formed for the purpose of acquiring the lands originally by means of the State's selection involved: that the entire proceeding by which title was sought to be acquired was fraudulent, and that the parties thereto should not be allowed to perfect title to the lands, to the injury of those who in good faith had entered the same under the public land laws.

Considering this petition, the Department stated in its decision of August 10th, 1907, that its previous decisions had been ex parte, and that the last decision favorable to Daniels did not prevent your office ordering a hearing, or taking other action with respect to the disposition of the claims of others which might be materially affected by the re-instatement of the claim of Daniels; and the case was accordingly remanded to your office for further consideration, to the end that a full and thorough investigation might be made into the matter, and your office was expressly advised that the previous decisions of the Land Department should in no wise embarass your action in the premises.

A hearing was accordingly ordered; and after due notice to all parties concerned, that the same was had before the local land office, May 25, 1908, Daniels appearing in person and by attorney, and the other parties claiming an interest either in person or by an attorney. The Local Land Office found that the case was not similar in all respects to that of the California and Oregon Land Company cited above; that in

that case there were no intervening rights or equities of other parties, while in the case under consideration the lands had been entered by bona fide settlers or purchasers, to many of whom final certificates had issued and in some instances even Patents had been issued.

The Register and Receiver accordingly recommended that the Homestead and Timber and Stone Entries of the various parties in the case should be allowed to remain in tact. Daniels appealed to your office, whereby your said decision of April 13, 1909, the action of the Local Office was reversed, and it was held that the Lieu Selections should remain in tact.

An appeal on behalf of the Homestead and Timber and Stone claimants brings the case before the Department. Most of the applicants to purchase the lands from the State upon whose supposed initiative these selections were made were not persons in being, but were fictitious persons, usually designated as "Dummies."

But while this is so, there is no evidence in this record showing or tending to show, that Daniels, or any person in privity with him, in fact, was a party to or had any knowledge of the intended fraud; and every material fact in this record supports the conclusion that Daniels bought in good faith, the Certificates of sale issued by the State. He had never heard of these State's Selections until one McHale, a timber land speculator of whom he had no personal acquaintance, but who was known to him by reputation, had reported to him that there was a large body of timber

land for sale, at Klamath, Oregon; and upon McHale's representations, he constituted McHale his agent under powers which amounted to, co-partnership, and McHale went to Klamath Falls to fully investigate these lands and the title thereto. McHale had instructions from Daniels, among other things, to secure the services of an attorney upon the question of title.

He did so. The attorney after an examination of the certificates of sale, reported that the title was good, and McHale's inquiries into the character of the land being satisfactory the results of his investigations was reported to Daniels and the deal was closed, upon the payment by Daniels of $23,901.10 for the certificates, of sale, and the further payment to the State of the unpaid ballance of the purchase price thereon, amounting to $3,033.74. Daniels had no personal acquaintance with any of the parties to the transactions; and so far as it appears from this record, he had no knowledge, information or belief which should have caused him to question the bona fides, of the people with whom he was dealing, or cause him to suspect that there was irregularity in the transaction. Nor was there anything in his connection with subsequent events, in his efforts to acquire title to these lands which may reasonably be said to go to the good faith of his purchase. It appears that rumors were soon thereafter rife with reference to land frauds in Oregon in connection with its school land grant.

The rumors reached Daniels and he promptly investigated them, finding for the first time that his title was questionable, upon the advice of his attorney, he initiated a contest against the State's selections upon which his title rested, hoping thereby to protect his purchase by acquiring an equitable preference right.

As a result of this contest, the state refunded the money which he had paid it and put in the hands of his attorney a relinquishment to the United States of all rights under its selections. Daniels then caused said relinquishments to be filed in the District Land Office, together with the Lieu Selections. There was certainly nothing reprehensible in this proceeding. Moreover, it was taken upon certain suggestions made in your said report of October 13, 1903. This report was responsive to a letter from the Governor of Oregon, September 28, 1903, wherein the inquiry was made of this department as to the means of protecting bona fide purchasers of the school indemnity lands from the State in instances where the State's selections had been cancelled for invalid base. Your offices reported among other things, and this is the same report transmitted to the Governor of Oregon, Oct. 13, 1903, that as to such selections—

while the selection is of record and uncancelled, the land is segregated thereby, and no right can be acquired by the presentation of an applicaiton therefor (29 L. D. 29), but the purchaser holding the State's relinquishment may present it with his application and thereby secure right of entry.

This is also the plain holding of this Department in the
in California and Oregon Land Company, supra, and is precisely the course pursued by Daniels in this case. His contest against the State's selection was to that end. He secured the State's relinquishments and presented them with the aforesaid applications to scrip the land.

It is true the record shows that the relinquishments were not marked, filed, in the local office until Feb. 10, 1904, which was two days after the presentation of the scrip applications.

It is further shown that it was the custom in that office to note the filing of the relinquishments of entries and filings upon public lands on the same day they were received in the office; and a clerk in said office gives it as his opinion that if these relinquishments had been receved on February 8, instead of February 10, the filing would have been noted on the day they were received.

But it is evident from the facts and circumstances surrounding the incident that the scrip applications and the State's relinquishments were, in fact, filed simultaneously.

The filing was by mail, and the letter of transmittal was written by Daniel's attorney, the said L. T. Barrin.

The letter recites that it contains the relinquishments in question, and it was received at the local land office February 8. Moreover, the action of the local officers at the time in rejecting the proffered

scrip applications, is put upon the ground that part of the lands were covered by pending homestead and timber and stone applications, whereas if the State had not then relinquished its school indemnity selections, the local officers would surely have assigned this as the reason for rejection of said applications, because this reason would have applied to all of the lands involved, instead of only a small portion of them, as was the case with the reason assigned.

It is worthy of too, that there has not been found any correspondence or record which would indicate that if the said Barin, had left these relinquishments out of his letter by inadvertence, they were ever afterwards transmitted to the local land office, and no correspondence or record of correspondence showing that if he had been guilty of such inadvertence he was ever advised thereof by the local officers.

I conclude therefore, on this branch of the case that the relinquishments in question and the scrip applications were filed at the same time, as was suggested they might be, in your office report of September 28th, 1903, above quoted.

Under existing regulations, it was the duty of the Register and Receiver to forward these applications, and these relinquishments without action for the consideration and disposition of your office. This however, it has been seen, was not done.

The scrip applications were rejected, and the history of the case, hereinbefore set out, shows that these applications were kept alive by successive appeals,

and that the case was twice remanded to the local officers, with directions to allow the applications, but various reasons were assigned for the neglect or failure of the local officers to obey these instructions.

It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the Secretary had been carried out, it would have been done before the case became complicated by the counter-equitable considerations arising upon the unfortunate allowance of the Homestead and Timber and Stone entries for most of these lands. It is thought however, that in instances where the land department has permitted these entries and filings to go of record, where they have become closed transactions, the Department would not be justified in cancelling such entries and filing, for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition.

See Hoyt vs. Weyerhauser et al). (161 F. E. D., Rep., 324).

It appears however, from your office reports of Dec. 16, 1909, that there are approximately 107 quarter Sections of land involved in this case. Of these, twenty-eight are involved in homestead entries, four

in cash entries and homestead entries, twenty-four in cash entries, twenty-five in Timber and Stone sworn statements, twelve are free and unappropriated, eight of them do not appear to be covered by the Lieu Selections in question, and seven of them have been patented.

In view of what has been said, the claim of Daniels must be denied as to all of them except those covered by Timber and Stone sworn statements only, and those that are unappropriated, amounting to what seems to be, from your office reports, approximately thirty-seven quarter sections in all.

As to these lands, the Timber and Stone applicants have not put themselves in privity with the United States, and the Land Department has not entered in to such Contract with them as to preclude other disposition of the lands.

See Campbell vs. Weyerhauser et al (161 Fed. Rep., 332).

This being true, and believing that the equities of Daniels should be protected to the fullest extent consistent with equitable administration, I have to direct that the Scrip applications be allowed as to all tracts which have not been otherwise disposed of, and rejected as to such as now appear to be covered by Homestead and cash entries.

The decision appeal from is modified. The papers are herewith returned.

Very respectfully,

FRANK PIERCE,

First Assistant Secretary.

Enclosures.

[Endorsed]: Amended Bill in Equity. Filed May 4, 1912

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of May, 1912, there was duly filed in said Court, a Demurrer, in words and figures as follows, to wit:

[Demurrer to Amended Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

ALVINA S. MERRITHEW,

Defendant.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF OREGON:

The demurrer of the above named plaintiff, Alvina S. Merrithew, to the amended bill of complaint of the above named plaintiff.

The defendant, by protestation, not confessing or acknowledging all or any of the matters or things in said amended bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said amended bill.

And for cause of demurrer shows:

I.

That it appears by plaintiff's own showing by the said amended bill that he is not entitled to the relief

prayed by said amended bill against this defendant.

II.

That the said bill of complaint is wholly without equity.

Wherefore, and for divers other good causes of demurrer appearing on said amended bill, this defendant demurs thereto, and she prays the judgment of this Honorable Court whether she shall be compelled to make further or any answer to the said bill; and she humbly prays that she may be hence dismissed with her reasonable costs in her behalf sustained.

ARTHUR I. MOULTON.
P. A. LAFFERTY,
Solicitors for Defendant.

STATE OF OREGON,
County of Multnomah—ss.

I, Arthur I. Moulton, being first duly sworn, on oath say: That I am one of solicitors for defendant in the within and foregoing cause; that in my opinion the foregoing demurrer is well taken in point of Law.

ARTHUR I. MOULTON.

Subscribed and sworn to before me this 24th day of May, 1912.

[Seal.] P. A. LAFFERTY,
Notary Public for Oregon.

STATE OF OREGON,
County of Multnomah—ss.

I, Alvina, S. Merrithew, being first duly sworn on oath say: That I am the defendant in the foregoing cause; that the foregoing demurrer is not interposed

for the purpose of delay.

ALVINA S. MERRITHEW,

Subscribed and sworn to before me this 24th day of May, 1912.

[Seal.] P. A. LAFFERTY,
Notary Public for Oregon.

[Endorsed]: Demurrer. Filed May 29, 1912.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 15 day of July, 1912, the same being the 12 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Decree.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

ALVINA S. MERRITHEW,

Defendant.

This cause came on to be heard on the demurrer of the defendant to the AMENDED BILL IN EQUITY of the Plaintiff herein, and the plaintiff appeared by his attorneys, Platt & Platt and Hugh Montgomery, and the defendant appeared by her attorneys, Arthur I. Moulten and P. A. Lafferty; and

the Court having heard the argument of counsel for the respective parties and having taken the said cause under advisement and fully considered the same, and now being fully advised therein, and it appearing to the Court that said demurrer is well taken and should be sustained,

IT IS HEREBY ORDERED, CONSIDERED, ADJUDGED AND DECREED by the Court that the said demurrer be and the same is hereby in all respects sustained, and that the amended bill of complaint of the plaintiff herein, be and the same is hereby dismissed, and that defendant herein have and recover of and from the said plaintiff, her costs and disbursehents herein, taxed at ..... Dollars.

Dated this 15th day of July, 1912.

R. S. BEAN,
Judge.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition for Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

ALVINA S. MERRITHEW,

Defendant.

The above named plaintiff conceiving himself aggrieved by the order and decree made and entered in the above entitled cause on the 15th day of July, 1912, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, papers, and proceedings and all things concerning the same, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon his filing a bond for the payment of all damages and costs if he fails to prosecute the said appeal to effect which bond shall act as a supersedeas bond.

A. D. DANIELS,

By Platt & Platt and Hugh Montgomery, Solicitors for Plaintiff.

Hugh Montgomery,

of Counsel.

[Endorsed]: Petition for Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

[Assignments of Error.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

ALVINA S. MERRITHEW,

Defendant.

Now on this 29th day of August, 1912, comes the above named plaintiff, A. D. Daniels, appearing by Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record, and says that in the record and proceedings of the above entitled Court, in the above entitled cause, and in the final order and decree entered therein on the 15th day of July, 1912, there is manifest error, and that said order and decree is erroneous and against the just rights of said plaintiff, and for error the said plaintiff assigns the following.

I.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the plaintiff, on the 8th day of April, 1904, made a valid forest lieu selection of the lands described in paragraph V of plaintiff's amended bill filed in said cause under and in accordance with the provisions of the Act of Congress of June 4th, 1897, set forth in paragraph VI of plaintiff's amended bill of complaint.

II.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that by the admissions of the demurrer, the forest lieu selection of the plaintiff, made upon the land described in paragraph V of his amended bill of complaint, was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly the defendant.

III.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the attempted homestead entry of the defendant was subsequent in time and inferior in right to the forest lieu selection of the plaintiff.

IV.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the forest lieu selections of the plaintiff had been approved by the proper officers of the United States government, which approval gave the plaintiff a vested interest in the land so selected.

V.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the alleged homestead entry of the defendant was made in contravention of the vested

rights of the plaintiff herein.

VI.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the plaintiff was equitably entitled to be protected in the forest lieu selections which he had made on the lands described in paragraph V of his amended bill of complaint as against the claims of the defendant or any person or persons whomsoever.

VII

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the plaintiff was equitably entitled to have the defendant declared a trustee for the plaintiff of the lands described in paragraph V of his amended bill of complaint.

VIII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that the bill of complaint stated a good cause of action to which the defendant should be required to file his answer or plea.

IX.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint and decreeing that said amended bill of complaint be dismissed and allowing costs to the defendant.

WHEREFORE, the plaintiff and appellant prays that the decree of said court be reversed and such

directions be given that full force and efficacy may enure to the plaintiff by reason of the cause of suit set up in his amended bill of complaint filed in said cause, and that a decree be entered in accordance with the prayer of plaintiff's amended Bill of Complaint.

PLATT & PLATT and HUGH MONTGOMERY,
Solicitors for Plaintiff.

Hugh Montgomery,
of Counsel.

[Endorsed]: Assignment of Errors. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, an Order Allowing Appeal, in words and figures as follows, to wit:

[Order Allowing Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,
Plaintiiff,

vs.

ALVINA S. MERRITHEW,
Defendant.

This day came A. D. Daniels, plaintiff, appearing by Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record and presented his petition for an appeal and an assignment of errors accompanying the same which petition, upon consideration of the court,

is hereby allowed, and the court allows an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon the filing of a bond in the sum of $500 with good and sufficient surety to be approved by the court; and

It is further ordered that said bond shall act as a supersedeas bond, and

It is further ordered that a certified transcript of the record, and all proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

R. S. BEAN,
Judge.

Dated this 29th day of August, 1912.

[Endorsed]: Order Allowing Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]

In the District Court of the United States, for the District of Oregon.

A. D. DANIELS,
Plaintiff,

vs.

ALVINA S. MERRITHEW,
Defendant.

KNOW ALL MEN BY THESE PRESENTS:

That we, A. D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, corporation, surety, are held and firmly bound unto Alvina S. Merrithew, in the full and just sum of five hundred ($500) dollars to be paid to the said Alvina S. Merrithew, her executors, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents.

Selaed with our seals this 29th day of August, A. D., 1912.

WHEREAS, lately at the District Court of the United States for the District of Oregon, in a suit pending in said court between A. D. Daniels, plaintiff, and Alvina S. Merrithew, defendant, a decree was rendered against said plaintiff, A. D. Daniels, and said A. D. Daniels having petitioned an appeal and filed a copy thereof in the clerk's office in said court to reverse the same in the aforesaid suit, and a citation directed to the said Alvina S. Merrithew citing and admonishing her to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be holden in the city of San Francisco in said Circuit, on the 28th day of September, A. D., 1912, having been served on said defendant;

NOW, the condition of this obligation is such, that if the said A. D. Daniels shall prosecute his appeal to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation

to be void, else to remain in full force and virtue.

A. D. DANIELS,

By Platt & Platt, His Solicitors of Record.

FIDELITY & REPOSIT COMPANY OF MARYLAND,

[Seal.] By W. J. CLEMENS,

Agent.

By Harrison G. Platt.

Examined and approved this 29th day of August, 1912.

R. S. BEAN,

District Judge.

[Endorsed]: Bond on Appeal. Filed Aug. 29, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of August, 1912, there was duly flied in said Court, a Citation on Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

A. D. DANIELS,

Appellant,

vs.

ALVINA S. MERRITHEW,

Appellee.

UNITED STATES OF AMERICA,
Ninth Judicial Circuit—ss.

TO ALVINA S. MERRITHEW, GREETING:

WHEREAS, A. D. Daniels, appellant in the above entitled suit has lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from a decree lately rendered in the District Court of the United States for the District of Oregon, made in favor of you, the said Alvina S. Merrithew, and has filed the security required by law; you are therefore hereby cited to appear before the said United States Circuit Court of Appeals at the City of San Francisco, State of California, on the 28th day of September, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the City of Portland in the Ninth Judicial Circuit this 29th day of August, in the year of our Lord, one thousand nine hundred twelve.

R. S. BEAN,
Judge of the District Court of the United States, in and for the District of Oregon.

UNITED STATES OF AMERICA,
District of Oregon—ss.

Due service of the within Citation to Appellees, by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 30 days of August, 1912.

ANGELL & FISHER,
of Attorneys for Appellees.

[Endorsed]: Citation to Appellee. Filed Aug. 30, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Saturday, the 28 day of September, 1912, the same being the 77 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

ALVINA S. MERRITHEW,

No. 3710.

September 28, 1912.

Now, at this day, for good cause shown, it is ORDERED that the plaintiff's time for filing and docketing the record on appeal in this cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same is hereby enlarged and extended ninety (90) days from this date.

R. S. BEAN, ...
Judge.

No. 2215

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

A. D. DANIELS,

Appellant,

vs.

ALVINA S. MERRITHEW,

Appellee.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

At a stated term, to wit, the October term A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2215.

A. D. DANIELS,

Appellant,

vs.

ALVINA S. MERRITHEW,

Appellee.

Order of Submission in U. S. Circuit Court of Appeals.

ORDERED, appeal in the above-entitled cause argued by Mr. Hugh Montgomery, counsel for the appellant, and by Mr. Arthur I. Moulton, counsel for the appellee, and submitted to the Court for consideration and decision.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

A. D. DANIELS,

Appellant,

vs.

JESSIE E. WAGNER,

Appellee.

Opinion U. S. Circuit Court of Appeals.

PLATT & PLATT and HUGH MONTGOMERY, for the Appellant.

ANGELL & FISHER, F. H. MILLS, ARTHUR I. MOULTON and P. A. LAFFERTY, for the Appellees.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

The decision in this case involves the merits of sixteen suits pending in this court on appeal, in all of which A. D. Daniels, the appellant, was the complainant in the court below. The object of each suit was to obtain a decree declaring the defendants therein holders of the legal title to the land described in each case as trustees for said complainant. Demurrers to the bills for want of equity were sustained, and from the decrees thereupon rendered dismissing the bills, the appeals are taken.

The allegations in the bills are substantially the same. In the case which is above-entitled the allegations are in substance the following: That on and prior to April 12, 1902, Edward B. Perrin and the

Aztec Land & Cattle Company, Ltd., a corporation, each owned certain lands in fee simple in the Territory of Arizona; that on that date those lands were included within the limits of the San Francisco Mountains Forest Reserves, and that thereafter, on February 2, 1904, under the provisions of the Act of Congress of June 4, 1897, the said land owners relinquished and conveyed to the United States their interest in said lands, and on February 8, 1904, they made lieu selections of certain public lands in Klamath County, Oregon, for the benefit of the complainant; that the selections were perfected by presenting the recorded deed, together with a full, true and correct abstract of title showing that the selectors were the owners in fee simple of the lands relinquished; that on or about June 28, 1902, the State of Oregon had filed upon the lands so selected certain instruments purporting to be school indemnity lists, and before the approval of the lists, had sold the lands to the complainant, but that thereafter, owing to the invalid character of the base lands tendered in said lists, the lists were held for cancellation, and in March and August, 1904, were finally cancelled and relinquishments of said lists were filed on behalf of the State of Oregon; that prior to such cancellation, the State of Oregon acting through the officers of the State Land Board, sold to various *bona fide* purchasers for value the timber lands upon which the said school indemnity lists had been filed, and that the appellant in good faith purchased the said lands from the State of Oregon; that thereafter, discovering that the State had no right, title or interest in

said lands so conveyed, the forest lieu selections already referred to were made for the purpose of protecting complainant's interest in said lands; that at the time of making their selections, the selectors filed with their selections relinquishments from the State of Oregon of any rights which it might have acquired by virtue of the school indemnity lists so filed by it; that after making such lieu selections and filing such relinquishments, the officers of the Land Office at Lakeview, Oregon, having allowed other entries to be made upon the lands so selected by homestead, timber and stone applications for the lands, rejected the selections so made by the complainant's predecessors in interest; that upon appeal to the Commissioner of the General Land Office, the action of the Register and Receiver at Lakeview was affirmed; that the Commissioner advanced as a further reason for the rejection that at the time when the lieu selections were presented at the local land office, the State indemnity school selections had not been cancelled or relinquished; that the State of Oregon executed relinquishments and the same were filed in the Land Office, bearing the file-mark of February 10, 1904; that the relinquishments were forwarded to the Commissioner of the General Land Office, and on March 7, 1904, he advised the Register and Receiver at Lakeview that the relinquishments had been received, and directed them to make due notation that the lists were cancelled, "leaving the lands open to entry by the first legal applicants"; that thereafter the appellee made application for the land at the local land office, and his filing was accepted; that thereafter various

proceedings were had in the Land Department, concerning the land so entered, and on August 10, 1907, the Secretary of the Interior instructed the Commissioner to order a hearing, that a full investigation might be had of the whole matter; that upon the hearing the local land office found that the lands had been entered by *bona fide* settlers or purchasers, to many of whom certificates, and in some instances, patents had issued; that the Register and Receiver accordingly recommended that such entries be allowed to remain, and the Secretary of the Interior finally so decided on February 17, 1910, holding that the greater equities were with the Homestead and Stone and Timber entrymen, and that in the discretion of the Secretary, such entries might be protected against the right of the scrip applications, and said: "It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons, and having done so, Daniels will not now be heard to question the correctness of that disposition."

GILBERT, Circuit Judge, after stating the case:

The appellant contends that by virtue of his offer to select the lands in question, and the tender in exchange therefor of a deed and abstract of title to the lands offered for surrender, he thereby became the equitable owner of the lands so sought to be selected, notwithstanding that his selection was rejected by the officers of the local land office, and that their rejection was affirmed by the Secretary of the Interior,

and that the patent having issued to the appellees, when in equity and good conscience, and according to law, it should have gone to the appellant, the Court should convert the holder of the legal title into a trustee for the appellant, and compel conveyance of the legal title to him.

In considering, in the light of the adjudications, the question here presented, it is essential to bear in mind the distinction between the right acquired by a Railroad Company, under a congressional grant of lands to aid the construction of a railroad, to select within the indemnity limits lands in lieu of those which are lost in the place limits, and the right of a lieu land selector under the Act of June 4, 1897. The former is a substantial right in the lands lying in the indemnity limits, given in consideration of the construction of a railroad, and is confined to specific lands within certain boundaries which are defined in the grant. It is a vested right, of which the grantee could not be deprived, by an Act of Congress or by other authority. In Weyerhaeuser vs. Hoyt, 219 U. S. 387, the Court declared that it was the intention of Congress in making such a grant, "to confer a substantial right to land within the indemnity limits in lieu of land lost within the place limits." The right of selection of lieu land given under the Act of June 4, 1897, however, is in the first instance but an offer by the Government to exchange lands. It is based upon no valuable consideration actually received. It attaches to no specific lands, nor to lands within any defined limits. It does not attach upon the mere presentation of the requisite papers. It at-

taches only when the authorized officers of the Government accept the offer to exchange. Nor is it true that the filing of the lieu selection papers and the acceptance of the same by the local Land Office segregates the land upon which the filing is made so as to cut off intervening and subsequent rights as against the lieu selectors. In Roughton vs. Knight, 219 U. S. 537–547, in construing the Act of June 4, 1897, the Court said: "Manifestly there must be an acceptance of the relinquishment by someone authorized to decide upon its sufficiency, and an assent to the particular selection made in lieu." In Cosmos Exploration Co. vs. Gray Eagle Oil Co., 190 U. S. 310, lieu land had been selected under the Act of June 4, 1897. The selector complied with the provisions of the Act. His selection was received and accepted, and entered on the records of the local land office. At that time there was no adverse claim. Before the issuance of a patent, the selector's grantee brought a suit against the defendants, who had entered the land as a mineral claim, he claiming that his grantor had become vested with the complete equitable title to the land so selected, and had become entitled to receive a patent. The Court held that it had no jurisdiction prior to the issuance of the patent to determine who was entitled to receive it, and that under the Act of June 4, 1897, the officers of the local land office had no authority to decide whether the selector had complied with the provisions of the Act, that authority being vested in the Commissioner of the General Land Office. The Court said: "But even the complete equitable title asserted by a complainant must,

as it would seem, be based upon the alleged right of the local land officers to accept the deed and approve the selection, even though such approval may be thereafter the subject of a review in the nature of an appeal from the action of the local officers. There must be a decision made somewhere regarding the rights asserted by the selector of land under the Act before a complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the statute, and the selector cannot decide the question for himself. We do not see how it can be successfully maintained that without any decision by any official representing the Government, and by merely filing the deed relinquishing to the Government a tract of forest reserve land, and assuming to select a similar area of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land." It is urged that this language of the Court is *dictum*, but we do not so regard it. It contains the reasoning of the Court in determining the nature of the rights of the complainant in that case. But if, indeed, it is true that the expression of such views was unnecessary to the determination of the case which was before the Court, the language used sets forth the mature and unanimous judgment of the members of that court on the question of law which is involved in the case at bar, and we deem it controlling in the decision of the present case.

Nor do we find ground to sustain the appellant's contention that the views of the Court so expressed

in the Cosmos Exploration Company case have been modified by the decision in Weyerhaeuser vs. Hoyt, 219 U. S. 380. That was a case which involved the right of a railroad company to select lands within the indemnity limits of its grant. The Court held that selections of lieu lands filed with the Secretary of the Interior excluded the right of others to appropriate the lands embraced therein pending action by the Secretary, and that the railroad company's rights to such lieu lands so selected were superior to those of a purchaser under the Timber and Stone Act who filed pending final decision by the Secretary, and that the final decision by the Secretary related back to the date of the original selections. Prior to that time, the Court had said, in New Orleans Pacific Ry. Co. vs. Parker, 143 U. S. 57: "As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected by the grantee and approved by the Secretary of the Interior." The same was held in Humbird vs. Avery, 195 U. S. 507. In Wisconsin Central Ry. Co. vs. Price County, 133 U. S. 496, 512, the Court said: "Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title"; and in Sjoli vs. Dreschel, 199 U. S. 565, the Court held it to be established doctrine "that no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior; that up to the time such approval is given, lands within indem-

nity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and, That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road." In the Weyerhaeuser case, the Court distinguished the Sjoli case by saying that it belonged to a class of cases in which there was no question of right by relation involved, and that the general language which we have quoted from the opinion was to be considered in view of the questions which were presented in that case, and that to apply it in the Weyerhaeuser case would be in effect to destroy the indemnity provisions of the Granting Act. No reference was made to the decision in the Cosmos Exploration Company case, and this was evidently for the reason that the language of the Court in that case was deemed to be applicable solely to the right of selection granted by the Act of June 4, 1897, and that the Court recognized and intended to reaffirm the vital distinction which it had found between such rights and the rights of a selector of indemnity lands under a grant to a railway company in aid of the construction of its road. Stalker vs. Oregon Short Line, 225 U. S. 142, is in line with Weyerhaeuser vs. Hoyt and so is Svor vs. Morris, 227 U. S. 524. We consider the decision in the Cosmos Exploration Company case authority for sustaining the decree of the

court below. But there is additional ground for sustaining it in the fact that, at the time when the appellant's selection was initiated on February 8, 1904, the lands involved herein appeared upon the records of the local land office as selected by the State of Oregon by certain school indemnity lists, and that those lists were not relinquished by the state until February 10, 1904. This sufficiently appears from the decision of the Secretary of the Interior, which is made an exhibit to the bill and is controlling in so far as it varies from the allegations of the bill. Greenameyer vs. Coate, 212 U. S. 434, 443.

The decree in each of the sixteen suits, Nos. 2212–2227, is affirmed.

[Endorsed]: Filed May 5, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2215.

A. D. DANIELS,

Appellant,

vs.

ALVINA S. MERRITHEW,

Appellee.

Decree, U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the District Court of the United

States for the District of Oregon, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant. It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered May 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Petition for Allowance of Appeal to Supreme Court of the United States.

PETITION FOR APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

The above-mentioned appellant, A. D. Daniels, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a decree has therein been rendered, on the fifth day of May, A. D. 1913, affirming the decree of the District Court of the United States for the District of Oregon, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs; that this cause is one involving the construction and application of a stat-

ute of the United States, to wit, Act of June 4, 1897, 30 Statutes at Large, 36 (U. S. Comp. Stats. 1901, p. 1541), and in which the decree of the United States Circuit Court of Appeals for the Ninth Circuit is not final, and is a proper cause to be appealed to the Supreme Court of the United States.

The above-named appellant, conceiving himself aggrieved by the decree made and entered in the above-entitled court and cause on the fifth day of May, 1913, does hereby appeal from said decree to the United States Supreme Court, for the reasons specified in the assignment of errors, which is filed herewith.

WHEREFORE, the said appellant prays that an appeal be allowed him in the above-entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors, herewith filed by the said appellant, may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

PLATT & PLATT,
Solicitors for Appellant.

[Endorsed]: Filed Jun. 2, 1913. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Title of Court and Cause.]

Assignment of Errors on Appeal to Supreme Court of the United States.

COMES NOW the appellant, A. D. Daniels, by Platt & Platt, his solicitors, and says that in the record and proceedings herein there is manifest error, and assigns error thereto as follows:

The United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the decree of the United States District Court for the District of Oregon sustaining the demurrer of appellee to appellant's amended bill of complaint and dismissing appellant's amended bill of complaint:

First. Because the demurrer to appellant's amended bill of complaint admits that on the 8th day of February, 1904, the appellant made a valid forest lieu selection of the land, described in paragraph V of appellant's amended bill filed in said cause, under and in accordance with the provision of the Act of Congress of June 4, 1897, set forth in paragraph VI of appellant's amended bill of complaint.

Second. Because the demurrer to appellant's amended bill of complaint admits that the forest lieu selection of appellant, made upon the lands described in paragraph V of his amended bill of complaint, was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly to that of the appellee.

Third. Because the demurrer to appellant's amended bill of complaint admits that the attempted

timber and stone entry of the appellee was subsequent in time and inferior in right to the forest lieu selection of appellant.

Fourth. Because the demurrer to appellant's amended bill of complaint admits that the forest lieu selections of appellant had been approved by the proper officers of the United States Government, which approval gave appellant a vested interest in the land so selected.

Fifth. Because the demurrer to appellant's amended bill of complaint admits that the alleged timber and stone entry of the appellee was made in contravention of the vested rights of the appellant herein to the land described in paragraph V of appellant's amended bill of complaint.

Sixth. Because the demurrer to appellant's amended bill of complaint admits that the appellant was equitably entitled to be protected in the forest lieu selection which he had made on the lands described in paragraph V of his amended bill of complaint as against the claims of the appellee, or any person or persons whatsoever.

Seventh. Because the demurrer to appellant's amended bill of complaint admits that the appellant was equitably entitled to have the appellee declared a trustee, for the appellant, of the lands described in paragraph V of appellant's amended bill of complaint.

Eighth. Because the demurrer to appellant's amended bill of complaint admits that the Oregon School Indemnity lists, covering the lands described in paragraph V of appellant's amended bill of com-

plaint, were relinquished simultaneously with the filing of the forest lieu selections by appellant.

Ninth. Because the demurrer to appellant's amended bill of complaint admits that the relinquishments of the Oregon school indemnity lists were filed on February 8, 1904.

Tenth. Because the appellant's amended bill of complaint stated a good cause of suit to which the appellee should have been required to file her answer or plea.

Eleventh. Because the decree of said District Court should have been reversed and the demurrer to appellant's amended bill of complaint overruled.

WHEREFORE, the appellant prays that the decree of the United States Circuit Court of Appeals for the Ninth Circuit be reversed, and such directions be given that force and efficacy may inure to the appellant by reason of the cause of suit set up in his amended bill of complaint filed in said cause, and that a decree be entered in accordance with the prayer of appellant's amended bill of complaint.

PLATT & PLATT,
Solicitors for Appellant.

[Endorsed]: Filed Jun. 2, 1913. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Title of Court and Cause.]

Order Allowing Appeal to Supreme Court U. S. and Fixing Amount of Bond.

IT IS HEREBY ORDERED, that the appeal in the above-entitled case to the Supreme Court of the

United States be, and the same is hereby, allowed as prayed.

AND IT IS FURTHER ORDERED that the amount of the appeal and supersedeas bond be, and the same hereby is, fixed at $500.00.

Dated this 3d day of June, 1913.

WM. B. GILBERT,
United States Circuit Judge, Ninth Circuit.

[Endorsed]: Filed Jun. 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Bond on Appeal to Supreme Court U. S.

KNOW ALL MEN BY THESE PRESENTS, that we, A. D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Alvina S. Merrithew, in the full and just sum of Five Hundred Dollars ($500.00), lawful money of the United States of America, to be paid to the said Alvina S. Merrithew, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals this 3d day of June, 1913.

WHEREAS, the appellant in the above-entitled suit is prosecuting an appeal to the United States Supreme Court to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Ninth Circuit on the 5th day of May, 1913;

NOW, THEREFORE, the condition of this obligation is such, that if the said appellant shall prosecute said appeal to effect, and answer all damages and costs if he fails to make said appeal good, then this obligation shall be void; otherwise to remain in full force and effect.

A. D. DANIELS, [Seal]
By PLATT & PLATT,
His Solicitors of Record.

FIDELITY & DEPOSIT CO. OF MARYLAND, [Seal]
By ROBERT T. PLATT,
Attorney in Fact.

CHESTER W. HANSEN,
Agent.

Examined and approved this 3d day of June, 1913.

WM. B. GILBERT,
Circuit Judge for the Ninth Circuit.

[Endorsed]: Filed Jun. 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Praecipe for Record on Appeal to Supreme Court of the United States.

To the Clerk of the said Court:

Sir: Please issue a certified Transcript of the Record on appeal to the Supreme Court of the United States in the above-entitled cause, consisting of the following:

1. Copy of Printed Transcript of Record on which case was heard in the Circuit Court of Appeals,

to which will be added a Copy of the following entitled papers that were filed, and of the Proceedings that were had in said Circuit Court of Appeals, viz.:

2. Order of Submission;
3. Opinion;
4. Decree;
5. Petition for Appeal to Supreme Court U. S.; and Order thereon;
6. Bond on Appeal to Supreme Court U. S.;
7. Assignment of Errors;
8. Praecipe for Certified Transcript of Record on Appeal to Supreme Court U. S.;
9. Certificate of Clerk U. S. C. C. A. to Transcript of Record on Appeal to Supreme Court U. S. and
10. Original Citation on Appeal to Supreme Court U. S.

PLATT & PLATT,
Solicitors for Appellant.

United States of America,
Ninth Judicial Circuit,—ss.

Due service of the within Praecipe for Transcript on appeal to Supreme Court U. S. is hereby acknowledged, and certified copy thereof received, at Portland, Oregon, this 7th day of June, 1913.

ARTHUR I. MOULTON,
Of Solicitors for Appellee.

[Endorsed]: Filed Jun. 10, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2215.

A. D. DANIELS,

Appellant,

vs.

ALVINA S. MERRITHEW,

Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record on Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-nine (69) pages, numbered from and including one (1) to and including sixty-nine (69), to be a full, true and correct copy of the complete record in the above-entitled cause, prepared pursuant to praecipe therefor filed by counsel for the appellant, including all proceedings had therein, and including the Opinion and the Assignment of Errors filed therein, as the same remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record in said cause on Appeal to the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twentieth day of June, A. D. 1913.

[Seal] F. D. MONCKTON,

Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2215.

A. D. DANIELS,

Appellant,

vs.

ALVINA S. MERRITHEW,

Appellee.

Citation on Appeal to Supreme Court U. S.

United States of America,
Ninth Circuit,—ss.
To Alvina S. Merrithew, Greetings:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, sixty (60) days after the date of this citation, pursuant to an appeal filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein A. D. Daniels is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable W. B. GILBERT, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 6th day of June, A. D. 1913.

WM. B. GILBERT,
Circuit Judge.

United States of America,
Ninth Judicial Circuit,—ss.

Due service of the within Citation to appellee is hereby acknowledged, and certified copy thereof received, at Portland, Oregon, this 7th day of June, 1913.

ARTHUR I. MOULTON,
Of Solicitors for Appellee.

[Endorsed]: No. 2215. In the United States Circuit Court of Appeals for the Ninth Circuit. A. D. Daniels, Appellant, vs. Alvina S. Merrithew, Appellee. Citation. Filed Jun. 10, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed on Cover.]

File No. 23,818.

U. S. Circuit Court Appeals, 9th Circuit.

Term No. 667.

A. D. DANIELS, Appellant,

vs.

ALVINA S. MERRITHEW.

Filed August 2d, 1913.

File No. 23,818.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 238

A. D. DANIELS, APPELLANT,

vs.

BERNICE SACKVILLE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED AUGUST 2, 1913.

(23,819)

(23,819)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 668.

A. D. DANIELS, APPELLANT,

vs.

BERNICE SACKVILLE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 25, 1913.

No. 2216

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

BERNICE SACKVILLE,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon

TRANSCRIPT OF RECORD.

LODGED
JAN - 2 1913
F. D. MONCKTON,
CLERK.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

BERNICE SACKVILLE,

Appellee.

Names and Addresses of Attorneys Upon This Appeal:

For the Appellant:

PLATT & PLATT and HUGH MONTGOMERY,
Board of Trade Bldg., Portland, Oregon

For the Appellees:

A. W. LAFFERTY, P. A. LAFFERTY and A. I. MOULTON,
Fenton Bldg., Portland, Oregon

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In the District Court of the United States for the District of Oregon.

Be it Remembered, That on the 4 day of May, 1912, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Bill in Epuity in words and figures as follows, to-wit:

[Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

BERNICE SACKVILLE,

Defendant.

To the Honorable Judge of the District Court of the United States in and for the District of Oregon:

A. D. Daniels, a citizen and inhabitant of the state of Wisconsin, residing at Rhinelander in said state, with leave of court first had and obtained, brings this, his amended bill of complaint,, against Bernice Sackville, a resident and inhabitant of the state of California, and residing at Sisson in said state.

An thereupon your orator complains and says:

I.

That at all times herein mentioned plaintiff was and is a resident and inhabitant of the state of Wisconsin, residing at Rhinelander in said state.

II.

An thereupon your orator further shows unto your

Honors:

That at all times herein mentioned, defendant, Bernice Sackville, was, and is, a resident and inhabitant of the state of California, residing at Sisson in said state.

III.

And thereupon your orator further shows unto your Honors:

That on the 12th day of April, 1902, and immediately prior thereto, one Aztec Land and Cattle Company, Ltd., a corporation, was the owner in fee simple, free of any lien or incumbrances, of that certain property located in the Territory of Arizona, and particularly described as follows, to wit:

All of sections twenty-five, twenty-seven, and twenty-nine, township sixteen north, range ten east; and the southeast quarter of section three, township nineteen north, range nine east G. & S. R. M., Arizona. and was the owner in fee simple of said property described in paragraph III of this amended complaint, up until the 2nd day of February, 1904.

IV.

And thereupon your orator further shows unto your Honors:

That on or about the 12th day of April, 1902, the said described lands, mentioned in paragraph III of this amended bill of complaint, were included within the limits of the San Francisco Mountains Forest Reserve, pursuant to a proclamation of the President of the United States made on or about the 12th day of April, 1902, which said lands were then, and still are, non-mineral lands.

V.

And thereupon your orator further shows unto your Honors:

That on or about the 8th day of February, 1904, that certain property situated within the District of Oregon, located in the county of Klamath in the State of Oregon, and particularly described as follows, towit:

> The north half of the northeast quarter and the southwest quarter of the northeast quarter and the southeast quarter of the northwest quarter of section eleven, township thirty-seven south, range ten east of the Willamette Meridian,

was surveyed, unappropriated, and vacant public land of the United States, returned and characterized upon the official records of the United States as non-mineral land, free and open to entry and settlement under and in accordance with the laws of the United States governing the acquisition of public lands.

VI.

And thereupon your orator further shows unto your Honors:

That on or about the 4th day of June, 1897, the Congress of the United States passed an act entitled: "An Act making appropriation for sundry civil expenses of the government, for the fiscal year ending June 30, 1898, and for other purposes;" which act provides, among other things, as follows, to wit:

> "That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within the limits of a forest reserva-

tion, the settler or owner thereof may, if he desires to do so, relinquish the tract to the govvernment, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the tract selected: Provided further, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claim."

VII.

An thereupon your orator further shows unto your Honors:

That, on the 2nd day of February, 1904, the said Aztec Land and Cattle Company, Ltd., a corporation, did, in accordance with the provisions and requirements of the act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, relinquish and convey unto the United States of America those certain tracts of land hereinbefore described in paragraph III of this amended complaint, and recorded the deed of conveyance in the office of the recorder of the county in which the lands are situated, and subsequently, and on the 8th day of February, 1904, filed with the Register and Receiver of the United States land office at Lakeview, Oregon, the said deed so recorded, together with a full, true, and correct abstract of title of the lands so

relinquished, duly certified as such by the county recorder of the county in which the lands are situated, which abstract of title showed it to be the owner in fee simple of said lands, free and clear of any lien or incumbrances, immediately prior to the time the deed to the United States was recorded, and thereupon and at the same time selected in lieu of said lands so relinquished,

> The north half of the northeast quarter and the southwest quarter of the northeast quarter and the southeast quarter of the northwest quarter of section eleven, township thirty-seven south, range ten east of the Willamette Meridian.

together with other lands, which selection so made was prior in time to the selection or entry of any other person or persons whomsoever, and, by virtue of said selection, there was initiated a right and interest prior in time and superior in right as against all persons whomsoever.

VIII.

And thereupon your orator shows unto your Honors:

That regardless of said selection so made as alleged in paragraph VII of this amended complaint, the defendant did, on June 13th, 1904, attempt to make a timber and stone entry upon the land described in paragraph V of this amended complaint.

IX.

And thereupon your orator further shows unto your Honors:

That on or about the 28th day of June, 1902, the

state of Oregon filed upon the said tracts so selected, together with certain other lands, certain instruments purporting to be school indemnity lists, which lists were numbered Lists 178 and 188, respectively, which said lists were duly and regularly accepted and filed by the Register and Receiver of the United States land office at Lakeview, Oregon, and thereupon were regularly transmitted to the Comissioner of the General Land Office of the United States government at Washington, D. C., to await the acceptance and approval of the land department of the United States government, but that, owing to the invalid character of the base lands tendered in said lists, the said lists were held for cancellation, and were subsequently cancelled upon relinquishments of said lists filed on behalf of the state of Oregon, on the 8th day of February, 1904.

X.

And thereupon your orator further shows unto your Honors:

That prior to the said cancellation of said school indemnity lists 178 and 188, and before any action whatsoever had been taken by the proper officers of the land department of the United States, except said Register and said Receiver, relative to the acceptance and rejection of the said indemnity lists, the State of Oregon, acting through the officers of the Oregon state land board, sold to various bona fide purchasers, for value, the timber lands upon which the said school indemnity lists 178 and 188 had been filed, and the said state had not at the time of such sale, nor has it at any time since ever acquired

or owned any right, title, or interest in or to the said lands upon which the said lists were filed, including those lands more particularly described in paragraph V of this amended bill of complaint, which said lands described in said paragraph V were, for a valuable consideration, and in good faith, and without any knowledge whatsoever of the irregularity of the proceedings which had taken place in connection with the sale thereof, or of the invalid character of the base lands which were tendered to the Federal government as the basis for the said selection by the state of Oregon, purchased from the said state of Oregon by the plaintiff herein.

XI.

And thereupon your orator further shows unto your Honors:

That subsequently and upon the discovery of the fact that all the proceedings in connection with the attempt to acquire said lands by filing of said lists 178 and 188, so filed as aforesaid, and more particularly those lands hereinbefore described in paragraph V of this amended bill of complaint, were irregular, and that by virtue of the filing of said lists the state of Oregon had acquired no interest and did not then have any right, title or interest in or to the said lands so selected, owing to the invalid character of the base land which had been tendered in exchange therefor, and the further fact that the said selected land had, nevertheless, been sold by the state of Oregon to many innocent purchasers for value, the state of Oregon, acting through the Honorable George E. Chamberlain, its governor, entered into negotiations with the Department of the Interior of the United

States, for the purpose of arriving at some arrangement wherein and whereby the interest of these bona fide purchasers from the state might be protected, and as a result of such negotiations, and on or about the 17th day of October, 1903, a letter was promulgated and transmitted to the governor of the state of Oregon by the Honorable Secretary of the Interior of the United States, of which letter the following is in part substantially a copy, to wit:

> "It (the state) may within sixty days allowed for appeal amend its selection by the substitution of a valid base, or, if unable to furnish such a base, it may, upon receipt of notice that the selection is held for cancellation, make a formal relinquishment of the selection, and give same to its grantee. While the selection is of record uncancelled the land is segregated thereby, and no right can be acquired by the presentation of an application therefor (29 L. D. 29), but the purchaser holding the state's relinquishment may present it with his application, and thereby secure the right of entry."

XII.

And thereupon your orator further shows unto your Honors:

That thereafter and in accordance with the terms of the arrangement thus agreed upon, as evidenced by the said letter of the Secreatary of the Interior, the said lieu selections so made as alleged in paragraph VII of this amended bill of complaint were made by the said Aztec Land and Cattle Company, Ltd., a corporation,

acting by A. L. Veazie, its attorney in fact, in the interest and for the benefit of the plaintiff herein, and for the purpose of protecting the interests of the plaintiff in and to said selected land acquired by virtue of the purchase so made by the plaintiff from the state of Oregon, as alleged in paragraph X of this amended complaint, and at the time of making said lieu selection so made as alleged in paragraph VII, and on the 8th day of February, 1904, the said lieu selector, Aztec Land and Cattle Company, Ltd., a corporation, acting by A. L. Veazie, its attorney in fact, presented, simultaneously with and together with the selection, as in paragraph VII of this amended complaint alleged, a relinquishment from the state of Oregon of all its right, title, and interest in and to the said selected land, which said relinquishment was made by the state of Oregon in the interest and for the benefit of the plaintiff herein, as grantee, which relinquishment is the same relinquishment referred to in paragraph IX hereof.

XIII.

And thereupon your orator further shows unto your Honors:

That the said forest lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, was in all respects regular and in accordance with the requirements of said act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, and in accordance with the requirements of the Secretary of the Interior in his letter of October 17, 1903, hereinbefore set forth in paragraph XI of this amended bill of complaint, and the local officers of the United

States land office at Lakeview, Oregon, did, on the 8th day of February, 1904, accept and file the said lieu selection, so made as aforesaid in paragraph VII of this amended bill of complaint, and did, on the 4th day of March, 1904, and at subsequent dates, attempt to reject said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, and stated, as a basis for said attempted rejection, that the said lieu selection was in conflict with certain homestead and timber and stone applications, which were made subsequently to the 8th day of February, 1904, and subsequently to the presentation and filing of the lieu selection, together with the relinquishment of the state of Oregon, as alleged in paragraph VII and XII of this amended bill of complaint.

XIV.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 8th day of April, 1904, said lieu selector and the plaintiff herein, together with other lieu selectors who had made other selections in the interest and for the benefit of the plaintiff herein, appealed from the ruling of the local officers of the United States land office at Lakeview, Oregon, by which ruling the sail local officers attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, upon which appeal the said ruling was affirmed by the Commissioner of the General Land Office at Washington, D. C., on or about the 30th day of March, 1905, and subsequently, and on or about the 25th day of October,

1905, the Honorable Secretary of the Interior of the United States, acting through the Honorable Frank Pierce, first assistant secretary, reversed the said decision and ruling of the Commissioner of the General Land Office, and directed that said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections similarly made, be allowed as of the date on which they were filed, to wit: the 8th day of February, 1904, and directed the Register and Receiver of the United States Land Office at Lakeview, Oregon, to allow said selections to remain of record as filed.

XV.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the 6th day of December, 1905, the local officers of the United States Land Office at Lakeview, Oregon, attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections, and alleged as a ground for said attempted rejection that the land covered by said selections had been withdrawn for the purpose of what was known as the Klamath River project, and said action of the said Register and Receiver of the United States Land Office at Lakeview, Oregon, in attempting to reject said selections, was subsequently reversed by order and direction of the Comissioner of the General Land Office, made on the 23rd day of January, 1906, who ordered and directed that the said lieu selection be allowed as of date February 8th, 1904.

XVI.

And thereupon your orator further shows unto your Honors:

That on or about the 5th day of March, 1906, and the 11th day of June, 1906, the Register and Receiver of the United States Land Office at Lakeview, Oregon, made objections to the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, and attempted thereby to reject said lieu selection referred to in paragraph VII of this amended complaint, which attempted objections were sustained on appeal by the Commissioner of the General Land Office and by the Department of the Interior, on the 20th day of June, 1906, and subsequently and on or about the 15th day of May, 1907, the Department of the Interior of the United States recalled its attempted decision of June 20, 1906, and entered an order directing the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, as of the date on which said lieu selection was filed, to wit: the 8th day of February, 1904, and ordered and directed that notice of such order be given to all parties who had made entries upon said lands subsequently to the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, which said notice was duly given as directed.

XVII.

And thereupon your orator further shows unto your Honors:

That subsequently, and as a result of the notice so

given, a petition for a review of the departmental decision last referred to was filed on behalf of one Archie Johnson, a claimant of part of the said lands embraced by said indemnity lists 178 and 188, which petition set forth the existence of an alleged conspiracy, averred to have been formed for the purpose of acquiring all of the said lands, in the first instance, and that the said lieu selection, so made as aforesaid, was in accordance with, and constituted a part of, said alleged conspiracy, and that the plaintiff herein was not a purchaser in good faith of said land described in paragraph V of this amended complaint, or any part thereof, which petition for review was allowed, upon the ground that all previous hearings before the Department of the Interior, so had as hereinbefore alleged, were purely ex parte and were, consequently, not proper proceedings in which to determine the merits of the adverse claims to the lands in question, for the purpose of basing a final decision thereon, and, therefore, an order was made directing that a final hearing should be held before the Register and Receiver of the United States land office at Lakeview, Oregon, for the purpose of determining the respective merits of various claims to the lands embraced within the said school indemnity lists 178 and 188.

XVIII.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 25th day of May, 1908, said hearing, so ordered as aforesaid, was duly and regularly had before the Register and Receiver

of the United States land office at Lakeview, Oregon, the plaintiff herein appearing in person and by attorneys, and the defendant and other adverse claimants appearing in person or by attorneys, at which time the said Register and Receiver, after duly hearing the respective parties, attempted to hold that the various homestead and timber and stone entries hereinbefore referred to in paragraph XIII of this amended complaint and particularly the entry of the defendant, which was made on the 13th day of June, 1904, should be allowed, which decision was subsequently, and on or about the 13th day of April, 1909, reversed by the Honorable Commissioner of the General Land Office, who held that the lieu selection referred to in paragraph VII of this amended complaint, together with other selections made in the interest of the plaintiff herein, had been duly and regularly made, and should be allowed to remain intact, upon the records of the United States Land Office, as of the date on which they were filed, to wit: February 8th, 1904.

XIX.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the ..... day of ....., 19....., an appeal from the decision of the Honorable Commissioner of the General Land Office, hereinbefore referred to in paragraph XVIII of this amended complaint, was taken by certain alleged homestead and timber and stone claimants, including the defendant, to the Department of the Interior of the United States, which department, acting through the

Honorable Frank Pierce, its First Assistant Secretary, found that the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, were filed simultaneously with the relinquishment and cancellation of said indemnity lists 178 and 188, to wit: on the 8th day of February, 1904, and before the attempted filing of the said alleged homestead and timber and stone entries, so made as alleged in paragraphs VIII and XIII of this amended complaint, and further found that the record then before said department fully showed, and every material fact supported the conclusion , that the plaintiff herein was a purchaser in good faith, free from fraud of any kind, and that the said alleged homestead and other entries, and particularly the entry of the defendant, were made subsequently to the 8th day of February, 1904, and after the filing of the lieu selection, so made as alleged in paragraph VII of this amended complaint, and that said lieu selection, so made as alleged in paragraph VII of this amended complaint, had been allowed by the Secretary of the Interior, as alleged in paragraphs XIV and XVI of this amended complaint, and had been allowed by the Commisisoner of the General Land Office, as alleged in paragraph XV of this amended complaint, and, based upon said findings, held that it was within the competency of the officers of the land department of the United States to allow the said alleged homestead and timber and stone entries to be made after the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, and the allowance of said selection, so made as alleged in

paragraphs XIII and XIV and XV of this amended complaint, and further held that said lieu selection, so made and allowed, would be denied in all instances where the local officers of the United States Land Office at Lakeview, Oregon, had attempted to allow homestead and timber and stone entries to be made, a copy of which decision is hereto attached and marked "Exhibit A", and, by reference, incorporated in and made a part of this amended complaint.

XX.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 14th day of July, 1910, and in accordance with the ruling of the decision hereinbefore referred to in paragraph XIX of this amended complaint, a patent to the following described lands, situated in the county of Klamath and state of Oregon, and particularly described as follows, to wit:

> The north half of the northeast quarter and the southwest quarter of the northeast quarter and the southeast quarter of the northwest quarter of section eleven, township thirty-seven south, range ten east of the Willamette Meridian;

was issued in the name of Bernice Sackville, the defendant herein, contrary to, and in violation of, the rights and equities of the plaintiff herein, and that the said patent so issued, as aforesaid, was issued by the officers of the United States government without regard to, and in contravention of, the vested rights of

the plaintiff herein, and in accordance with the ruling of the Department of the Interior, as evidenced by the decision referred to in paragraph XIX of this amended complaint.

XXI.

And thereupon your orator further shows unto your Honors:

That this is a suit between citizens of different states, and that the amount in controversy herein exceeds the amount of three thousand ($3000) dollars, exclusive of interest and costs.

XXII.

And thereupon your orator further shows unto your Honors:

That he has no plain, adequate, or speedy remedy at law, but only in equity.

WHEREFORE, and forasmuch as your orator is remediless in the premises, under and by strict rules of common law, and can only have relief in a court of equity where matters of this nature are recognizable and reviewable, files this, his amended bill of complaint, and prays:

I. That the defendant may be adjudged and decreed to hold said lands described in paragraph V in trust for your orator, and to convey the same to your orator, and deliver to your orator any patent or other deeds of the same in her possession, and be restrained and enjoined from hereafter setting up any claim or title to said lands or any part thereof, or in any manner intermeddling therewith, or removing any timber or other product therefrom.

II. That the defendant may be adjudged and decreed to hold any timber or other product by her or her servants or agents removed from said land, or the proceeds or manufactured product from the same, in trust for your orator, and may be decreed to account to your orator for the same, or the value thereof, and to repay to your orator said value, with interest from the date of sale, if the same has been sold by the said defendant.

III. That upon the failure of the defendant to make said conveyance and to deliver to your orator any patent or other deeds of the said lands described in said paragraph V, within a period of thirty days from the entry of the decree of this court, the said decree be adjudged and decreed to stand as a conveyance in lieu of such patent or other deeds.

IV. And your orator further prays: That your Honors may grant unto your orator a writ of subpoenae of the United States issued out of and under the seal of this Honorable Court, directed to the defendant, Bernice Sackville, therein and thereby commanding said defendant, under a certain penalty therein to be named, personally to be and appear before your Honorable Court, then and there to answer, all and singular, (but not under oath, answer under oath being expressly waived), the matters and things aforesaid, and to stand and abide by and sustain such direction and decree as shall be made herein, as to your Honors shall seem equitable and just.

V. And your orator prays for such further relief in the premises as the nature and circumstances of this cause may require and to your Honorable Court may

seem reasonable and proper.

And your orator, as in duty bound, will ever pray.

A. D. DANIELS,

By Platt & Platt & Hugh Montgomery,

His Solicitors.

HUGH MONTGOMERY,

Of Counsel,

D. C. M. G. B. G.

DEPARTMENT OF INTERIOR.

Washington, Feb. 17, 1910.

E--900.

Aztec Land & Cattle Company, Lt'd.

E. B. Perrin

Lieu Selectors,

A. D. Daniels,

Claimant of Beneficial Interest,

vs.

Archie Johnson, et al,

Intervenors.

The Commissioner

Of the General Land Office.

Sir:

This is the appeal of Archie Johnson, et al., intervenors, from your office decision of April 13, 1909, sustaining the claim of A. D. Daniels, beneficiary under Lieu Selections, Nos. 15016, 15017 and 18, (Serials 0714, 0715, 0716) for certain described lands in the Lakeview Land District, Oregon. Questions affecting the validity of these selections have been subject of numerous decisions of the Land Department, and a detail statement of such proceedings covering a period of more than eight years, must of necessity be set out

in detail, if the issues now presented may be properly understood.

January 28, 1902, the lands involved were selected by the State of Oregon, per school indemnity lists Nos. 178 and 188 these lists were held for cancellation by your office, because of invalid base, and were finally cancelled in March and August, 1904, upon relinquishments filed on behalf of the state. The date of the filing of these relinquishments is one of the disputed questions in this record: and while not necessarily controlling, it is in view of this case important, and will be considered on its merits in the progress of this paper.

For present statement, it will be enough to say that the local officers and your office have found that it was filed Feb. 10, 1904, whereas it is claimed on behalf of A. D. Daniels, owner of the Beneficial interest in certain Forest Lieu Selections of these same lands, that it was filed Feb. 8, 1904. However this may be, the Forest Lieu Selections in question were filed on said last named date Feb. 8, 1904, but were rejected by the local officers in a letter to one, L. T. Barin, March 4, 1904, for conflict with certain homestead and timber and stone applications for part of the same lands, These Forest Lieu Selections were filed by Barin in the name of Edward B. Perrin, and Aztec Land and Cattle Co. but the said A. D. Daniels was the beneficial owner of the scrip, which was filed in his interests to protect his purchase from the state under its aforesaid Invalid Indemnity Selections.

On appeal, your office affirmed the action of the

Register and Receiver, giving as further reason and justification thereof the fact, that the Lieu Selections were presented at the local land office prior to cancellation of said Indemnity School Selections, and even prior to the filing of the state's relinquishment. Upon appeal, however, from this action of your office, the Department, Oct. 25, 1905, reversed your office decision, stating while the appeal was pending an affidavit had been filed by A. D. Daniels in which he stated that he was the real party in interest and the equitable owner of the lands assigned as bases for the Lieu Selections; that after its selections of the lands as School Indemnity, the State of Oregon had sold them to sundry purchasers, who paid part of the purchase price and assigned the certificates of sale to him, and he was then the owner thereof; that he thereafter became doubtful as to the validity of the State selection, and in order to protect his interests obtained relinquishments from the State and caused them to be filed in the Local Land Office at Lakeview with Lieu Selections; that in so doing he relied upon your office report of Oct. 13, 1904, (1903) to the Secretary of the Interior; which report was transmitted by the Department to the Governor of Oregon Oct. 17, 1904 (1903).

Considering the appeal, the Department held that the case, was controlled by its decision in the California and Oregon Land Company, (33 L. D. 595), that this case was in all essential respects the same as that one, and remanded the case with directions to adjudicate it thereunder. The Lieu Selections having

been returned to the Register and Receiver for allowance in accordance with said decisions, they were again, on Dec. 6, 1905, rejected by the local officers, for the reason that the lands had been withdrawn by telegram of June 25, 1904, for the Klamath River project. This action of the Register and Receiver was reversed by your officer Jan. 23, 1906, and the selections were remanded to be entered of record as of date Feb. 8, 1904, the day on which they were originally presented, if no other objection appeared. Under dates of March 5, and June 11, 1906, the Register submitted full reports to your office upon the said applications; and stated there were objections to the allowance of the same, in that there were various homesteads and timber and stone applications which had been allowed subsequently to the cancellation of the state's list. The Register also referred to the fact that Daniels had caused a contest to be instituted against the State's selection, and questioned his good faith in the matter.

Separate appeals were taken by the Aztec Land and Cattle Company and Perrin from this action of the local officers, and the papers in connection with the application of the Aztec Company were transmitted to the Department by your office, letter of May 9, 1906, for further consideration in connection with the report of the local office.

Upon sonsideration of the matter thus presented, the Department held in its decision of June 26, 1906, that the facts failed to show that Daniels, was entitled to protection as a Bona Fide purchaser from the

state; that the State's selections were filed Jan. 28, 1902, while the lands were sold on Jan. 21st, preceding, at which they were public lands of the United States, and no one purchasing them could claim to be a Bona Fide purchaser from the State; that as late as Oct. 5, 1903, Daniels was not asserting that he was a purchaser in good faith from the State, but was acting adversely to it and attempting to contest the lists under which he later asked for recognition as a Bona Fide purchaser and for equitable relief; that this position then was inconsistent with the position later assumed: and if had since acquired assignments of the State's certificates of sale, he had done so with full knowledge of the invalidity of the State's claim; that the facts set forth above were fatal to his contention that he was a Bona Fide purchaser, and as such should be permitted to file the State's relinquishment and obtain precedence over others seeking to appropriate the lands under the General land laws; that to conceed to him this privilege under letters Oct. 17 & 13, 1903, mentioned above, would in effect, be to make such persons as from time to time might constitute the State Land Board, agents to dispose of the public lands of the United States, within the State, to such persons as they might favor by means of sales of public land as state land, the subsequent filing of the State's list invalid for want of sufficient base; the filing of the State's relinquishment, and the protection of the purchaser from the state by grace of the Land Department. The Department accordingly held in that decision that the lieu selection should be rejected.

A motion for review of said decision of June 26th, 1906, having been filed by Daniels, Department, on May 15 and 18, 1907, rendered decisions holding that while Daniels, was not, strictly speaking a Bona Fide purchaser from the State, because the Certificates of sale issued by the State antedated the filing of the School Indemnity Selections, and therefore were made at a time when there was no actual claim of the State pending, still Daniels had not purchased the land until the month of April, 1902, nearly three months after the lands had been actually selected by the State, and that having paid a valuable consideration for the lands in an honest belief that a title was being obtained, that was sufficient to constitute a Bona Fide Purchase.

The decision of June 26th, 1906, was therefore recalled, and it was ordered that the Lieu Selection should be reinstated.

In promulgating the decision last mentioned, your office returned the Lieu Selections to the Local Land Office for allowance, and instructed the Register and Receiver to notify all parties who had made entry of said lands subsequently to the cancellation of the State's list to show cause within sixty days why their entries should not be cancelled, because of conflict with said Lieu Selections as a result of which a petition termed, a motion for re-review of Departmental decisions of May 15, and 18, 1907, was filed on behalf of Archie. Johnson who claimed a part of the Lands under a sale made thereof under the Public Land Laws.

This petition or motion charged, in effect, that a conspiracy had been formed for the purpose of acquiring the lands originally by means of the State's selection involved: that the entire proceeding by which title was sought to be acquired was fraudulent, and that the parties thereto should not be allowed to perfect title to the lands, to the injury of those who in good faith had entered the same under the public land laws.

Considering this petition, the Department stated in its decision of August 10th, 1907, that its previous decisions had been ex parte, and that the last decision favorable to Daniels did not prevent your office ordering a hearing, or taking other action with respect to the disposition of the claims of others which might be materially affected by the re-instatement of the claim of Daniels; and the case was accordingly remanded to your office for further consideration, to the end that a full and thorough investigation might be made into the matter, and your office was expressly advised that the previous decisions of the Land Department should in no wise embarass your action in the premises.

A hearing was accordingly ordered; and after due notice to all parties concerned, that the same was had before the local land office, May 25, 1908, Daniels appearing in person and by attorney, and the other parties claiming an interest either in person or by an attorney. The Local Land Office found that the case was not similar in all respects to that of the California and Oregon Land Company cited above; that in

that case there were no intervening rights or equities of other parties, while in the case under consideration the lands had been entered by bona fide settlers or purchasers, to many of whom final certificates had issued and in some instances even Patents had been issued.

The Register and Receiver accordingly recommended that the Homestead and Timber and Stone Entries of the various parties in the case should be allowed to remain in tact. Daniels appealed to your office, whereby your said decision of April 13, 1909, the action of the Local Office was reversed, and it was held that the Lieu Selections should remain in tact.

An appeal on behalf of the Homestead and Timber and Stone claimants brings the case before the Department. Most of the applicants to purchase the lands from the State upon whose supposed initiative these selections were made were not persons in being, but were fictitious persons, usually designated as "Dummies."

But while this is so, there is no evidence in this record showing or tending to show, that Daniels, or any person in privity with him, in fact, was a party to or had any knowledge of the intended fraud; and every material fact in this record supports the conclusion that Daniels bought in good faith, the Certificates of sale issued by the State. He had never heard of these State's Selections until one McHale, a timber land speculator of whom he had no personal acquaintance, but who was known to him by reputation, had reported to him that there was a large body of timber

land for sale, at Klamath, Oregon; and upon McHale's representations, he constituted McHale his agent under powers which amounted to, co-partnership, and McHale went to Klamath Falls to fully investigate these lands and the title thereto. McHale had instructions from Daniels, among other things, to secure the services of an attorney upon the question of title.

He did so. The attorney after an examination of the certificates of sale, reported that the title was good, and McHale's inquiries into the character of the land being satisfactory the results of his investigations was reported to Daniels and the deal was closed, upon the payment by Daniels of $23,901.10 for the certificates, of sale, and the further payment to the State of the unpaid ballance of the purchase price thereon, amounting to $3,033.74. Daniels had no personal acquaintance with any of the parties to the transactions; and so far as it appears from this record, he had no knowledge, information or belief which should have caused him to question the bona fides, of the people with whom he was dealing, or cause him to suspect that there was irregularity in the transaction. Nor was there anything in his connection with subsequent events, in his efforts to acquire title to these lands which may reasonably be said to go to the good faith of his purchase. It appears that rumors were soon thereafter rife with reference to land frauds in Oregon in connection with its school land grant.

The rumors reached Daniels and he promptly investigated them, finding for the first time that his title was questionable, upon the advice of his attorney, he initiated a contest against the State's selections upon which his title rested, hoping thereby to protect his purchase by acquiring an equitable preference right.

As a result of this contest, the state refunded the money which he had paid it and put in the hands of his attorney a relinquishment to the United States of all rights under its selections. Daniels then caused said relinquishments to be filed in the District Land Office, together with the Lieu Selections. There was certainly nothing reprehensible in this proceeding. Moreover, it was taken upon certain suggestions made in your said report of October 13, 1903. This report was responsive to a letter from the Governor of Oregon, September 28, 1903, wherein the inquiry was made of this department as to the means of protecting bona fide purchasers of the school indemnity lands from the State in instances where the State's selections had been cancelled for invalid base. Your offices reported among other things, and this is the same report transmitted to the Governor of Oregon, Oct. 13, 1903, that as to such selections—

while the selection is of record and uncancelled, the land is segregated thereby, and no right can be acquired by the presentation of an applicaiton therefor (29 L. D. 29), but the purchaser holding the State's relinquishment may present it with his application and thereby secure right of entry.

This is also the plain holding of this Department in the
in California and Oregon Land Company, supra, and is precisely the course pursued by Daniels in this case. His contest against the State's selection was to that end. He secured the State's relinquishments and presented them with the aforesaid applications to scrip the land.

It is true the record shows that the relinquishments were not marked, filed, in the local office until Feb. 10, 1904, which was two days after the presentation of the scrip applications.

It is further shown that it was the custom in that office to note the filing of the relinquishments of entries and filings upon public lands on the same day they were received in the office; and a clerk in said office gives it as his opinion that if these relinquishments had been receved on February 8, instead of February 10, the filing would have been noted on the day they were received.

But it is evident from the facts and circumstances surrounding the incident that the scrip applications and the State's relinquishments were, in fact, filed simultaneously.

The filing was by mail, and the letter of transmittal was written by Daniel's attorney, the said L. T. Barrin.

The letter recites that it contains the relinquishments in question, and it was received at the local land office February 8. Moreover, the action of the local officers at the time in rejecting the proffered

scrip applications, is put upon the ground that part of the lands were covered by pending homestead and timber and stone applications, whereas if the State had not then relinquished its school indemnity selections, the local officers would surely have assigned this as the reason for rejection of said applications, because this reason would have applied to all of the lands involved, instead of only a small portion of them, as was the case with the reason assigned.

It is worthy of too, that there has not been found any correspondence or record which would indicate that if the said Barin, had left these relinquishments out of his letter by inadvertence, they were ever afterwards transmitted to the local land office, and no correspondence or record of correspondence showing that if he had been guilty of such inadvertence he was ever advised thereof by the local officers.

I conclude therefore, on this branch of the case that the relinquishments in question and the scrip applications were filed at the same time, as was suggested they might be, in your office report of September 28th, 1903, above quoted.

Under existing regulations, it was the duty of the Register and Receiver to forward these applications, and these relinquishments without action for the consideration and disposition of your office. This however, it has been seen, was not done.

The scrip applications were rejected, and the history of the case, hereinbefore set out, shows that these applications were kept alive by successive appeals,

and that the case was twice remanded to the local officers, with directions to allow the applications, but various reasons were assigned for the neglect or failure of the local officers to obey these instructions.

It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the Secretary had been carried out, it would have been done before the case became complicated by the counter-equitable considerations arising upon the unfortunate allowance of the Homestead and Timber and Stone entries for most of these lands. It is thought however, that in instances where the land department has permitted these entries and filings to go of record, where they have become closed transactions, the Department would not be justified in cancelling such entries and filing, for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition.

See Hoyt vs. Weyerhauser et al). (161 F. E. D., Rep., 324).

It appears however, from your office reports of Dec. 16, 1909, that there are approximately 107 quarter Sections of land involved in this case. Of these, twenty-eight are involved in homestead entries, four

in cash entries and homestead entries, twenty-four in cash entries, twenty-five in Timber and Stone sworn statements, twelve are free and unappropriated, eight of them do not appear to be covered by the Lieu Selections in question, and seven of them have been patented.

In view of what has been said, the claim of Daniels must be denied as to all of them except those covered by Timber and Stone sworn statements only, and those that are unappropriated, amounting to what seems to be, from your office reports, approximately thirty-seven quarter sections in all.

As to these lands, the Timber and Stone applicants have not put themselves in privity with the United States, and the Land Department has not entered in to such Contract with them as to preclude other disposition of the lands.

See Campbell vs. Weyerhauser et al (161 Fed. Rep., 332).

This being true, and believing that the equities of Daniels should be protected to the fullest extent consistent with equitable administration, I have to direct that the Scrip applications be allowed as to all tracts which have not been otherwise disposed of, and rejected as to such as now appear to be covered by Homestead and cash entries.

The decision appeal from is modified. The papers are herewith returned.

Very respectfully,

FRANK PIERCE,

First Assistant Secretary.

Enclosures.

[Endorsed]: Amended Bill In Equity. Filed May 4, 1912. A. M. Cannon, Clerk U. S. Dist. Court.

And afterwards, to wit, on the 29 day of July, 1912, there was issued out of said Court a Demurrer in words and figures, as follows, to wit:

[Demurrer to Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

BERNICE SACKVILLE,

Defendant.

DEMURRER.

To the Honorable Judges of the United States District Court, for the District of Oregon:

The demurrer of the above named defendant, Bernice Sackville, to the amended bill of complaint of the above named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said amended bill of complaint contained in such manner and form as the same are therein set forth and alleged, demurs to the said amended bill.

And for cause of demurrer shows:

I.

That it appears by the plaintiff's own showing by the said amended bill that he is not entitled to the relief prayed against this defendant by the said amended bill.

II.

That the said amended bill of complaint of the plaintiff is wholly without equity.

Wherefore, and for diverse other good causes of demurrer appearing on the said amended bill, this defendant demurs thereto, and she prays the judgment of this Honorable Court whether she shall be compelled to make further or any answer to the said amended bill, and she humbly prays to be hence dismissed with her reasonable costs in her behalf sustained.

ARTHUR I. MOULTON,
P. A. LAFFERTY,
Solicitors for Defendant.

State of Oregon,
County of Multnomah,—ss.

I, Arthur I. Moulton, being first duly sworn, on oath say: That I am one of the solicitors for the defendant, Bernice Sackville, in the within entitled cause; that the foregoing demurrer is, in my opinion, well founded in point of law; and on behalf of the said defendant, I say that the said demurrer is not interposed for delay, the said defendant not being within the State of Oregon.

ARTHUR I. MOULTON.

Subscribed and sworn to before me this 24th day of May, 1912.

(Seal) P. A. LAFFERTY,
Notary Public for Oregon.

[Endorsed]: Demurrer. Filed May 29, 1912. A. M. Cannon, Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 15 day of July, 1912, the same being the 12 Judicial day of the

Regular July, 1912 Term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Decree.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff.

vs.

BERNICE SACKVILLE,

Defendant.

Decree Plaintiff Dissmissing Amended Bill in Equity.

This cause came on to be heard on the demurrer of the defendant to the ameded bill in Equity of the above named plaintiff herein, and the plaintiff appeared by his attorneys, Messrs. Platt & Platt and Hugh Montgomery, and the defendant appeared by Arthur I. Moulton and P. A. Lafferty and the court having heard the arguments of counsel for the respective parties, and having taken the said cause under advisement, and fully considered the same, and being now fully advised in the premises, and it appearing to the court that the said demurrer is well taken and should be sustained,

It is therefore ordered, considered, adjudged and decreed by the court that the said demurrer be, and the same is hereby, in all respects sustained, and the said amended bill of complaint be, and the same is hereby dismissed, and that defendant have and recover of and from said plaintiff his costs and disbursements here-

in, taxed at $.....

Dated this 15 day of July, 1912.

R. S. BEAN,
Judge.

And afterwards, to wit, on the 29 day of August, 1912, there was filed in said Court a Petition for Appeal in words and figures, as follows, to wit:

[Petition for Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,
Plaintiff,

vs.

BERNICE SACKVILLE,
Defendant.

The above named plaintiff, conceiving himself aggrieved by the order and decree made and entered in the above entitled cause on the 15th day of July, 1912, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Judicial District, for the reasons specified in the Assignment of Errors, which is fied herewith, and he prays that this appeal may be allowed, and that a transcript of the record, papers, and proceedings, and all things concerning the same, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon his filing a bond for the payment of all damages and costs if he fails to prosecute the said appeal to effect, which bond shall act as a supersedeas bond.

A. D. DANIELS,

By Platt & Platt and Hugh Montgomery,
Solicitors for Plaintiff.

HUGH MONTGOMERY,
Of Counsel.

[Endorsed]: Petition for Appeal. Filed Aug. 29, 1912. A. M. Cannon, Clerk, U. S. Dist. Court.

And afterwards, to wit, on the 29 day of August, 1912, there was issued out of said Court Assignments of Error in words and figures, as follows, to wit:

[Assignments of Error.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,
Plaintiff.

vs.

BERNICE SACKVILLE,
Defendant.

Now on this 29th day of August, 1912, comes the above named plaintiff, A. D. Daniels, appearing by Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record, and says that in the record and proceedings of the above entitled Court in the above entitled cause and in the final order and decree entered therein on the 15th day of July, 1912, there is manifest error and that said order and decree is erroneous and against the rights of said plaintiff, and for error the said plaintiff assigns the following:

I.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint

in that it did not hold that by the admissions of the demurrer the plaintiff, on the 8th day of April, 1904, made a valid forest lieu selection of the lands described in paragraph V of plaintiff's amended bill filed in said cause under and in accordance with the provisions of the act of Congress of June 4th, 1897, set forth in paragraph VII of plaintiff's amended bill of complaint.

II.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the forest lieu selection of the plaintiff made upon the lands described in paragraph V of his amended bill of complaint was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever and particularly the defendant.

III.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the attempted timber and stone entry of the defendant was subsequent in time and inferior in right to the forest lieu selection of the plaintiff.

IV.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the forest lieu selections of the plaintiff had been approved by the proper officers of the United States government which approval gave the plaintiff a vested interest in the land so selected.

V.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the alleged timber and stone entry of the defendant was made in contravention of the vested rights of the plaintiff herein.

VI.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff was equitably entitled to be protected in the forest lieu selections which he had made on the lands described in paragraph V of his amended bill of complaint, as against the claims of the defendant or any persons or persons whomsoever.

VII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff was equitably entitled to have the defendant declared a trustee for the plaintiff of the lands described in paragraph V of his amended bill of complaint.

VIII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that the bill of complaint stated a good cause of action to which the defendant should be required to file her answer or plea.

IX.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint and decreeing that said amended bill of complaint be dismissed and allowing costs to the defendant.

WHEREFORE, the plaintiff and appellant prays that the decree of said court be reversed and such directions be given that full force and efficacy may enure to the plaintiff by reason of the cause of suit set up in his amended bill of complaint filed in said cause and that a decree be entered in accordance with the prayer of plaintiff's amended Bill of Complaint.

PLATT & PLATT & HUGH MONTGOMERY,
Solicitors for Plaintiff.

HUGH MONTGOMERY,
Of Counsel.

[Endorsed]: Assignment of Errors. Filed Aug. 29, 1912. A. M.Cannon, Clerk U. S. Dist. Court.

And afterwards, to wit, on the 29 day of August, 1912, there was filed in said Court an Order Allowing Appeal in Words and figures, as follows, to-wit:

[Order Allowing Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,
Plaintiff,

vs.

BERNICE SACKVILLE,
Defendant.

This day came A. D. Daniels, plaintiff, appearing by Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record and presented his petition for an appeal and an assignment of errors accompanying the same which petition, upon consideration of the court, is hereby allowed, and the court allows an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon the filing of a bond in the sum of $500 with good and sufficient surety to be approved by the court; and

It is further ordered that said bond shall act as a supersedeas bond, and

It is further ordered that a certified transcript of the record, and all proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

R. S. BEAN,
Judge.

Dated this 29th day of August, 1912.

[Endorsed]: Order Allowing Appeal. Filed Aug. 29, 1912 A. M. Cannon, Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was issued out of said Court a Bond on Appeal in words and figures, as follows, to wit:

[Bond on Appeal.]

In the District Court of the United States, for the District of Oregon.

A. D. DANIELS,
Plaintiff,

vs.

BERNICE SACKVILLE,
Defendant.

KNOW ALL MEN BY THESE PRESENTS:

That we, A. D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Bernice Sackville, in the full and just sum of five hundred ($500) dollars, to be paid to the said Bernice Sackville, her executors, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents;

Sealed with our seals this 29th day of August, A. D. 1912.

WHEREAS, lately at the District Court of the United States for the District of Oregon, in a suit pending in said court between A. D. Daniels, plaintiff, and Bernice Sackville, defendant, a decree was rendered against said plaintiff, A. D. Daniels, and said A. D. Daniels having petitioned an appeal and filed a copy thereof in the clerk's office in said court to reverse the same in the aforesaid suit, and a citation directed to the said Bernice Sackville citing and admonishing her to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be holden in the city of San Francisco in said Circuit, on the 28th day of September, A. D. 1912, having been served on said defendant;

NOW, the condition of this obligation is such, that if the said A. D. Daniels shall prosecute his appeal to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void, else to remain in full force and effect.

A. D. DANIELS.

By Platt & Platt,
His Solicitors of Record.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

[Seal] By Harrison G. Platt,
Attorney in Fact.
By W. J. Clemens,
Agent.

Examined and approved this 29th day of August, 1912.

R. S. BEAN,
Judge.

[Endorsed]: Bond on Appeal. Filed Aug. 29, 1912. A. M. Cannon, Clerk U. S. Dist. Court.

And afterwards, to wit, on the 30 day of August, 1912, there was duly filed in said Court, a Citation on Appeal in words and figures as follows, to wit:

[Citation on Appeal.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

A. D. DANIELS,
Appellant,

vs.

BERNICE SACKVILLE,
Appellee.

United States of America,
Ninth Judicial Circuit.—ss.

TO BERNICE SACKVILLE, GREETING:

WHEREAS, A. D. Daniels, appellant in the above entitled suit has lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit,

from a decree lately rendered in the District Court of the United States for the District of Oregon, made in favor of you, the said Bernice Sackville, and has filed the security required by law; you are therefore hereby cited to appear before the said United States Circuit Court of Appeals at the city of San Francisco, state of California, on the 28th day of September, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the city of Portland in the Ninth Judicial Circuit this 29th day of August, in the year of our Lord, one thousand nine hundred twelve.

R. S. BEAN,

Judge of the District Court of the United States, for the District of Oregon.

United States of America,
District of Oregon.—ss.

Due service of the within citation to Appellee, by certified copy thereby, as required by law, is hereby acknowledged at Portland, Oregon, the 30th day of August, 1912.

ARTHUR I. MOULTON,
Of Attorneys for Appellee.

[Endorsed]: Citation to Appeal. Filed August 30, 1912. A. M. Cannon, Clerk U. S. Dist. Court.

And afterwards, to wit, on Saturday, the 28 day of September, 1912, the same being the 77 Judicial day of the Regular July 1912 Term of said Court; Present: the Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

In the District Court of the United States, for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

BERNICE SACKVILLE,

Defendant.

No. 5461.

September 28, 1912.

Now, at this day for good cause shown, it is ordered that the plaintiff's time for filing and docketing the record on appeal in this cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same is hereby enlarged and extended ninety (90) days from this date.

R. S. BEAN,

Judge.

No. 2216

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

A. D. DANIELS,

Appellant,

vs.

BERNICE SACKVILLE,

Appellee.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

At a stated term, to wit, the October Term, A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2216.

A. D. DANIELS,

Appellant,

vs.

BERNICE SACKVILLE,

Appellee.

Order of Submission in U. S. Circuit Court of Appeals.

ORDERED, appeal in the above-entitled cause argued by Mr. Hugh Montgomery, counsel for the appellant, and by Mr. Arthur I. Moulton, counsel for the appellee, and submitted to the Court for consideration and decision.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

A. D. DANIELS,

Appellant,

vs.

JESSIE E. WAGNER,

Appellee.

Opinion U. S. Circuit Court of Appeals.

PLATT & PLATT and HUGH MONTGOMERY, for the Appellant.

ANGELL & FISHER, F. H. MILLS, ARTHUR I. MOULTON and P. A. LAFFERTY, for the Appellees.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

The decision in this case involves the merits of sixteen suits pending in this court on appeal, in all of which A. D. Daniels, the appellant, was the complainant in the court below. The object of each suit was to obtain a decree declaring the defendants therein holders of the legal title to the land described in each case as trustees for said complainant. Demurrers to the bills for want of equity were sustained, and from the decrees thereupon rendered dismissing the bills, the appeals are taken.

The allegations in the bills are substantially the same. In the case which is above-entitled the allegations are in substance the following: That on and prior to April 12, 1902, Edward B. Perrin and the

Aztec Land & Cattle Company, Ltd., a corporation, each owned certain lands in fee simple in the Territory of Arizona; that on that date those lands were included within the limits of the San Francisco Mountains Forest Reserves, and that thereafter, on February 2, 1904, under the provisions of the Act of Congress of June 4, 1897, the said land owners relinquished and conveyed to the United States their interest in said lands, and on February 8, 1904, they made lieu selections of certain public lands in Klamath County, Oregon, for the benefit of the complainant; that the selections were perfected by presenting the recorded deed, together with a full, true and correct abstract of title showing that the selectors were the owners in fee simple of the lands relinquished; that on or about June 28, 1902, the State of Oregon had filed upon the lands so selected certain instruments purporting to be school indemnity lists, and before the approval of the lists, had sold the lands to the complainant, but that thereafter, owing to the invalid character of the base lands tendered in said lists, the lists were held for cancellation, and in March and August, 1904, were finally cancelled and relinquishments of said lists were filed on behalf of the State of Oregon; that prior to such cancellation, the State of Oregon acting through the officers of the State Land Board, sold to various *bona fide* purchasers for value the timber lands upon which the said school indemnity lists had been filed, and that the appellant in good faith purchased the said lands from the State of Oregon; that thereafter, discovering that the State had no right, title or interest in

said lands so conveyed, the forest lieu selections already referred to were made for the purpose of protecting complainant's interest in said lands; that at the time of making their selections, the selectors filed with their selections relinquishments from the State of Oregon of any rights which it might have acquired by virtue of the school indemnity lists so filed by it; that after making such lieu selections and filing such relinquishments, the officers of the Land Office at Lakeview, Oregon, having allowed other entries to be made upon the lands so selected by homestead, timber and stone applications for the lands, rejected the selections so made by the complainant's predecessors in interest; that upon appeal to the Commissioner of the General Land Office, the action of the Register and Receiver at Lakeview was affirmed; that the Commissioner advanced as a further reason for the rejection that at the time when the lieu selections were presented at the local land office, the State indemnity school selections had not been cancelled or relinquished; that the State of Oregon executed relinquishments and the same were filed in the Land Office, bearing the file-mark of February 10, 1904; that the relinquishments were forwarded to the Commissioner of the General Land Office, and on March 7, 1904, he advised the Register and Receiver at Lakeview that the relinquishments had been received, and directed them to make due notation that the lists were cancelled, "leaving the lands open to entry by the first legal applicants"; that thereafter the appellee made application for the land at the local land office, and his filing was accepted; that thereafter various

proceedings were had in the Land Department, concerning the land so entered, and on August 10, 1907, the Secretary of the Interior instructed the Commissioner to order a hearing, that a full investigation might be had of the whole matter; that upon the hearing the local land office found that the lands had been entered by *bona fide* settlers or purchasers, to many of whom certificates, and in some instances, patents had issued; that the Register and Receiver accordingly recommended that such entries be allowed to remain, and the Secretary of the Interior finally so decided on February 17, 1910, holding that the greater equities were with the Homestead and Stone and Timber entrymen, and that in the discretion of the Secretary, such entries might be protected against the right of the scrip applications, and said: "It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons, and having done so, Daniels will not now be heard to question the correctness of that disposition."

GILBERT, Circuit Judge, after stating the case:

The appellant contends that by virtue of his offer to select the lands in question, and the tender in exchange therefor of a deed and abstract of title to the lands offered for surrender, he thereby became the equitable owner of the lands so sought to be selected, notwithstanding that his selection was rejected by the officers of the local land office, and that their rejection was affirmed by the Secretary of the Interior,

and that the patent having issued to the appellees, when in equity and good conscience, and according to law, it should have gone to the appellant, the Court should convert the holder of the legal title into a trustee for the appellant, and compel conveyance of the legal title to him.

In considering, in the light of the adjudications, the question here presented, it is essential to bear in mind the distinction between the right acquired by a Railroad Company, under a congressional grant of lands to aid the construction of a railroad, to select within the indemnity limits lands in lieu of those which are lost in the place limits, and the right of a lieu land selector under the Act of June 4, 1897. The former is a substantial right in the lands lying in the indemnity limits, given in consideration of the construction of a railroad, and is confined to specific lands within certain boundaries which are defined in the grant. It is a vested right, of which the grantee could not be deprived, by an Act of Congress or by other authority. In Weyerhaeuser vs. Hoyt, 219 U. S. 387, the Court declared that it was the intention of Congress in making such a grant, "to confer a substantial right to land within the indemnity limits in lieu of land lost within the place limits." The right of selection of lieu land given under the Act of June 4, 1897, however, is in the first instance but an offer by the Government to exchange lands. It is based upon no valuable consideration actually received. It attaches to no specific lands, nor to lands within any defined limits. It does not attach upon the mere presentation of the requisite papers. It at-

taches only when the authorized officers of the Government accept the offer to exchange. Nor is it true that the filing of the lieu selection papers and the acceptance of the same by the local Land Office segregates the land upon which the filing is made so as to cut off intervening and subsequent rights as against the lieu selectors. In Roughton vs. Knight, 219 U. S. 537–547, in construing the Act of June 4, 1897, the Court said: "Manifestly there must be an acceptance of the relinquishment by someone authorized to decide upon its sufficiency, and an assent to the particular selection made in lieu." In Cosmos Exploration Co. vs. Gray Eagle Oil Co., 190 U. S. 310, lieu land had been selected under the Act of June 4, 1897. The selector complied with the provisions of the Act. His selection was received and accepted, and entered on the records of the local land office. At that time there was no adverse claim. Before the issuance of a patent, the selector's grantee brought a suit against the defendants, who had entered the land as a mineral claim, he claiming that his grantor had become vested with the complete equitable title to the land so selected, and had become entitled to receive a patent. The Court held that it had no jurisdiction prior to the issuance of the patent to determine who was entitled to receive it, and that under the Act of June 4, 1897, the officers of the local land office had no authority to decide whether the selector had complied with the provisions of the Act, that authority being vested in the Commissioner of the General Land Office. The Court said: "But even the complete equitable title asserted by a complainant must,

as it would seem, be based upon the alleged right of the local land officers to accept the deed and approve the selection, even though such approval may be thereafter the subject of a review in the nature of an appeal from the action of the local officers. There must be a decision made somewhere regarding the rights asserted by the selector of land under the Act before a complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the statute, and the selector cannot decide the question for himself. We do not see how it can be successfully maintained that without any decision by any official representing the Government, and by merely filing the deed relinquishing to the Government a tract of forest reserve land, and assuming to select a similar area of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land." It is urged that this language of the Court is *dictum*, but we do not so regard it. It contains the reasoning of the Court in determining the nature of the rights of the complainant in that case. But if, indeed, it is true that the expression of such views was unnecessary to the determination of the case which was before the Court, the language used sets forth the mature and unanimous judgment of the members of that court on the question of law which is involved in the case at bar, and we deem it controlling in the decision of the present case.

Nor do we find ground to sustain the appellant's contention that the views of the Court so expressed

in the Cosmos Exploration Company case have been modified by the decision in Weyerhaeuser vs. Hoyt, 219 U. S. 380. That was a case which involved the right of a railroad company to select lands within the indemnity limits of its grant. The Court held that selections of lieu lands filed with the Secretary of the Interior excluded the right of others to appropriate the lands embraced therein pending action by the Secretary, and that the railroad company's rights to such lieu lands so selected were superior to those of a purchaser under the Timber and Stone Act who filed pending final decision by the Secretary, and that the final decision by the Secretary related back to the date of the original selections. Prior to that time, the Court had said, in New Orleans Pacific Ry. Co. vs. Parker, 143 U. S. 57: "As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected by the grantee and approved by the Secretary of the Interior." The same was held in Humbird vs. Avery, 195 U. S. 507. In Wisconsin Central Ry. Co. vs. Price County, 133 U. S. 496, 512, the Court said: "Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title"; and in Sjoli vs. Dreschel, 199 U. S. 565, the Court held it to be established doctrine "that no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior; that up to the time such approval is given, lands within indem-

nity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and, That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road." In the Weyerhaeuser case, the Court distinguished the Sjoli case by saying that it belonged to a class of cases in which there was no question of right by relation involved, and that the general language which we have quoted from the opinion was to be considered in view of the questions which were presented in that case, and that to apply it in the Weyerhaeuser case would be in effect to destroy the indemnity provisions of the Granting Act. No reference was made to the decision in the Cosmos Exploration Company case, and this was evidently for the reason that the language of the Court in that case was deemed to be applicable solely to the right of selection granted by the Act of June 4, 1897, and that the Court recognized and intended to reaffirm the vital distinction which it had found between such rights and the rights of a selector of indemnity lands under a grant to a railway company in aid of the construction of its road. Stalker vs. Oregon Short Line, 225 U. S. 142, is in line with Weyerhaeuser vs. Hoyt and so is Syer vs. Morris, 227 U. S. 324. We consider the decision in the Cosmos Exploration Company case authority for sustaining the decree of the

court below. But there is additional ground for sustaining it in the fact that, at the time when the appellant's selection was initiated on February 6, 1903, the lands involved herein appeared upon the records of the local land office as selected by the State of Oregon by certain school indemnity lists, and that those lists were not relinquished by the State until February 20, 1904. This sufficiently appears from the decision of the Secretary of the Interior, which is made an exhibit to the bill and is controlling in so far as it rests on the allegations of the bill. *Greenmayer vs. Coate*, 212 U. S. 434, 442.

The decree in each of the sixteen suits, Nos. 2212-2227, is affirmed.

[Endorsed]: Filed May 5, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2226.

A. D. DANIELS,

Appellant,

vs.

BERNICE SACKVILLE,

Appellee.

Decree U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the District of Oregon.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United

States for the District of Oregon and was duly submitted:

On consideration whereof, it is now here ordered adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for her costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered, May 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Petition for Allowance of Appeal to Supreme Court of the United States.

PETITION FOR APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

The above-entitled appellant, A. D. Daniels, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit and that a decree has therein been rendered, on the fifth day of May, A. D. 1913, affirming the decree of the District Court of the United States for the District of Oregon, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs; that this cause is one

involving the construction and application of a statute of the United States, to wit, Act of June 4, 1897, 30 Statutes at Large, 36 (U. S. Comp. Stats. 1901, p. 1541), and in which the decree of the United States Circuit Court of Appeals for the Ninth Circuit is not final, and is a proper cause to be appealed to the Supreme Court of the United States.

The above-named appellant, conceiving himself aggrieved by the decree made and entered in the above-entitled court and cause on the fifth day of May, 1913, does hereby appeal from said decree to the United States Supreme Court, for the reasons specified in the assignment of errors, which is filed herewith.

WHEREFORE, the said appellant prays that an appeal be allowed him in the above-entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors, herewith filed by the said appellant, may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

PLATT & PLATT,
Solicitors for Appellant.

[Endorsed]: Filed Jun. 2, 1913. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Title of Court and Cause.]

Assignment of Errors on Appeal to Supreme Court of the United States.

COMES NOW the appellant, A. D. Daniels, by Platt & Platt, his solicitors, and says that in the record and proceedings herein there is manifest error, and assigns error thereto as follows:

The United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the decree of the United States District Court for the District of Oregon sustaining the demurrer of appellee to appellant's amended bill of complaint and dismissing appellant's amended bill of complaint:

First. Because the demurrer to appellant's amended bill of complaint admits that on the 8th day of February, 1904, the appellant made a valid forest lieu selection of the land, described in paragraph V of appellant's amended bill filed in said cause, under and in accordance with the provision of the Act of Congress of June 4, 1897, set forth in paragraph VI of appellant's amended bill of complaint.

Second. Because the demurrer to appellant's amended bill of complaint admits that the forest lieu selection of appellant, made upon the lands described in paragraph V of his amended bill of complaint, was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly to that of the appellee.

Third. Because the demurrer to appellant's amended bill of complaint admits that the attempted timber and stone entry of the appellee was subse-

quent in time and inferior in right to the forest lieu selection of appellant.

Fourth. Because the demurrer to appellant's amended bill of complaint admits that the forest lieu selections of appellant had been approved by the proper officers of the United States Government, which approval gave appellant a vested interest in the land so selected.

Fifth. Because the demurrer to appellant's amended bill of complaint admits that the alleged timber and stone entry of the appellee was made in contravention of the vested rights of the appellant herein to the land described in paragraph V of appellant's amended bill of complaint.

Sixth. Because the demurrer to appellant's amended bill of complaint admits that the appellant was equitably entitled to be protected in the forest lieu selection which he had made on the lands described in paragraph V of his amended bill of complaint as against the claims of the appellee, or any person or persons whatsoever.

Seventh. Because the demurrer to appellant's amended bill of complaint admits that the appellant was equitably entitled to have the appellee declared a trustee, for the appellant, of the lands described in paragraph V of appellant's amended bill of complaint.

Eighth. Because the demurrer to appellant's amended bill of complaint admits that the Oregon school indemnity lists, covering the lands described in paragraph V of appellant's amended bill of complaint, were relinquished simultaneously with the fil-

ing of the forest lieu selections by appellant.

Ninth. Because the demurrer to appellant's amended bill of complaint admits that the relinquishments of the Oregon school indemnity lists were filed on February 8, 1904.

Tenth. Because the appellant's amended bill of complaint stated a good cause of suit to which the appellee should have been required to file her answer or plea.

Eleventh. Because the decree of said District Court should have been reversed and the demurrer to appellant's amended bill of complaint overruled.

WHEREFORE, the appellant prays that the decree of the United States Circuit Court of Appeals for the Ninth Circuit be reversed, and such directions be given that force and efficacy may inure to the appellant by reason of the cause of suit set up in his amended bill of complaint filed in said cause, and that a decree be entered in accordance with the prayer of appellant's amended bill of complaint.

PLATT & PLATT,
Solicitors for Appellant.

[Endorsed]: Filed Jun. 2, 1913. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Title of Court and Cause.]

Order Allowing Appeal to Supreme Court U. S. and Fixing Amount of Bond.

IT IS HEREBY ORDERED, that the appeal in the above-entitled case to the Supreme Court of the

United States be, and the same is hereby, allowed as prayed.

AND IT IS FURTHER ORDERED that the amount of the appeal and supersedeas bond be, and the same hereby is, fixed at $500.00.

Dated this 3d day of June, 1913.

WM. B. GILBERT,
United States Circuit Judge, Ninth Circuit.

[Endorsed]: Filed Jun. 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Bond on Appeal to Supreme Court U. S.

KNOW ALL MEN BY THESE PRESENTS, that we, A. D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Bernice Sackville, in the full and just sum of Five Hundred Dollars ($500.00), lawful money of the United States of America, to be paid to the said Bernice Sackville, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals this 3d day of June, 1913.

WHEREAS, the appellant in the above-entitled suit is prosecuting an appeal to the United States Supreme Court to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Ninth Circuit on the 5th day of May, 1913;

NOW, THEREFORE, the condition of this obligation is such, that if the said appellant shall prosecute said appeal to effect, and answer all damages and costs if he fails to make said appeal good, then this obligation shall be void; otherwise to remain in full force and effect.

A. D. DANIELS. [Seal]
By PLATT & PLATT,
His Solicitors of Record.

FIDELITY & DEPOSIT CO. OF MARYLAND. [Seal]
By ROBERT T. PLATT,
Attorney in Fact.
CHESTER W. HANSEN,
Agent.

Examined and approved this 3d day of June, 1913.
WM. B. GILBERT,
Circuit Judge for the Ninth Circuit.

[Endorsed]: Filed Jun. 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Praecipe for Record on Appeal to Supreme Court of the United States.

To the Clerk of the said Court:

Sir: Please issue a certified Transcript of the Record on appeal to the Supreme Court of the United States in the above-entitled cause, consisting of the following:

1. Copy of Printed Transcript of Record on which case was heard in the Circuit Court of Appeals, to

which will be added a Copy of the following-entitled papers that were filed, and of the Proceedings that were had in said Circuit Court of Appeals, viz.:

2. Order of Submission;

3. Opinion;

4. Decree;

5. Petition for appeal to Supreme Court U. S.; and Order thereon;

6. Bond on Appeal to Supreme Court U. S.;

7. Assignment of Errors;

8. Praecipe for Certified Transcript of Record on Appeal to Supreme Court U. S.;

9. Certificate of Clerk U. S. C. C. A. to Transcript of Record on Appeal to Supreme Court U. S., and

10. Original Citation on Appeal to Supreme Court U. S.

PLATT & PLATT,
Solicitors for Appellant.

United States of America,
Ninth Judicial Circuit,—ss.

Due service of the within Praecipe for Transcript on Appeal to Supreme Court U. S. is hereby acknowledged, and certified copy thereof received, at Portland, Oregon, this 7th day of June, 1913.

ARTHUR I. MOULTON,
Of Solicitors for Appellee.

[Endorsed]: Filed Jun. 10, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2216.

A. D. DANIELS,

Appellant,

vs.

BERNICE SACKVILLE,

Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record on Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-seven (67) pages, numbered from and including one (1) to and including sixty-seven (67), to be a full, true and correct copy of the complete record in the above-entitled cause, prepared pursuant to praecipe therefor filed by counsel for the appellant, including all proceedings had therein, and including the Opinion and the Assignment of Errors filed therein, as the same remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record in said cause on Appeal to the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twentieth day of June, A. D. 1913.

[Seal] F. D. MONCKTON,

Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2216.

A. D. DANIELS,

Appellant,

vs.

BERNICE SACKVILLE,

Appellee.

Citation on Appeal to Supreme Court U. S.

United States of America,
Ninth Circuit,—ss.

To Bernice Sackville, Greetings:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, sixty (60) days after the date of this citation, pursuant to an appeal filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein A. D. Daniels is appellant and you are appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable W. B. GILBERT, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 6th day of June, A. D. 1913.

WM. B. GILBERT,
Circuit Judge.

United States of America,
Ninth Judicial Circuit,—ss.

Due service of the within Citation to appellee is hereby acknowledged, and certified copy thereof received, at Portland, Oregon, this 7th day of June, 1913.

ARTHUR I. MOULTON,
Of Solicitors for Appellee.

[Endorsed]: No. 2216. In the United States Circuit Court of Appeals for the Ninth Circuit. A. D. Daniels, Appellant, vs. Bernice Sackville, Appellee. Citation. Filed Jun. 10, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed on Cover.]

File No. 23,819.

U. S. Circuit Court Appeals, 9th Circuit.

Term No. 665.

A. D. DANIELS, Appellant,
vs.
BERNICE SACKVILLE.

Filed August 2d, 1913.

File No. 23,819.

(23,826)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 675.

A. D. DANIELS, APPELLANT.

vs.

MASON C. MESERVEY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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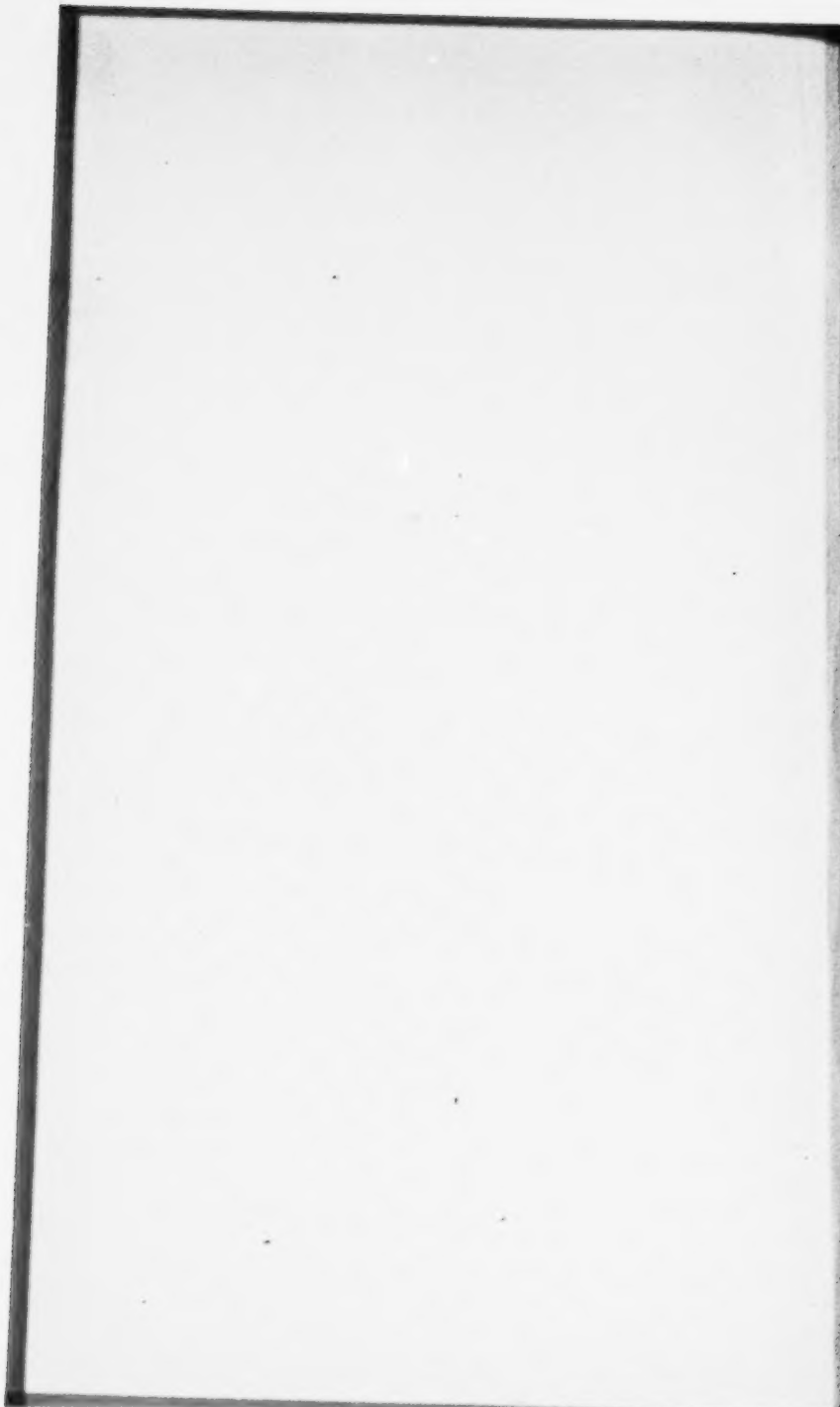

No. 2224

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

MASON C. MESERVEY,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon

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TRANSCRIPT OF RECORD.

LODGED

JAN - 2 1913

F. D. MONCKTON,

CLERK.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

MASON C. MESERVEY,

Appellee.

Names and Addresses of Attorneys Upon This Appeal:

For the Appellant:

PLATT & PLATT and HUGH MONTGOMERY,
Board of Trade Bldg., Portland, Oregon

For the Appellee:

ARTHUR I. MOULTON,
P. A. LAFFERTY,
Fenton Bldg., Portland, Oregon

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In the District Court of the United States for the District of Oregon.

Be it remembered that on the 13 day of May, 1912, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Bill of Complaint in words and figures as follows, to wit:

[Amended Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

MASON C. MESERVEY,

Defendant.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF OREGON:

A. D. Daniels, a citizen and inhabitant of the state of Wisconsin, residing at Rhinelander in said state, with leave of court first had and obtained, brings this, his amended bill of complaint, against Mason C. Meservey, a resident and inhabitant of the state of Oregon, and residing at Portland, in said state.

And thereupon your orator complains and says:

I.

That at all times herein mentioned plaintiff was and is a resident and inhabitant of the state of Wisconsin, residing at Rhinelander in said state.

II.

And thereupon your orator further shows unto your Honors:

That at all times herein mentioned defendant, Mason C. Meservey, was, and is, a resident and inhabitant of the state of Oregon, residing at Portland, in said state.

III.

And thereupon your orator further shows unto your Honors:

That on the 12th day of April, 1902, and immediately prior thereto, one Edward B. Perrin was the owner in fee simple, free of any lien or incumbrances, of that certain property located in the Territory of Arizona, and particularly described as follows, to-wit:

> The south half of Section five (5) township twenty-two (22) north, range one (1) east; and the south half of section three (3), township twenty-two (22) north, range two (2) east; and the south half of section thirty-five (35), township twenty-two (22) north, range three (3) east, and lots one (1) and two (2), section one (1), township twenty-three (23) north, range three (3) east, and lot two (2) section one (1), lot three (3) section five (5) and the north half of the northeast quarter of section twenty-one (21), township twenty-three (23) north, range four (4) east, G. & S. R. M., Arizona,

and was the owner in fee simple of said property described in paragraph III of this amended complaint, up until the 2nd day of February, 1904.

IV.

And thereupon your orator further shows unto your Honors:

That on or about the 12th day of April, 1902, the said described lands, mentioned in paragraph III of this amended bill of complaint, were included within the limits of the San Francisco Mountains Forest Reserves, pursuant to a proclamation of the President of the United States made on or about the 12th day of April, 1902, which said lands were then, and still are, non-mineral lands.

V.

And thereupon your orator further shows unto your Honors:

That on or about the 8th day of February, 1904, that certain property situated within the District of Oregon, located in the county of Klamath, in the state of Oregon, and particularly described as follows, to-wit:

> Lot one (1), section two (2), township thirty-seven (37) south, range ten (10) east of the Wilamette Meridian,

was surveyed, unappropriated, and vacant public land of the United States, returned and characterized upon the official records of the United States as non-mineral land, free and open to entry and settlement under and in accordance with the laws of the United States governing the acquisition of public lands.

VI.

And thereupon your orator further shows unto your Honors:

That on or about the 4th day of June, 1897, the Con-

gress of the United States passed an act entitled: "An act making appropriation for sundry civil expenses of the government, for the fiscal year ending June 30, 1898, and for other purposes"; which act provides, among other things, as follows, to-wit:

> "That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the tract selected: Provided further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claim."

VII.

And thereupon your orator further shows unto your Honors:

That on or about the 2nd day of February, 1904, the said Edward B. Perrin did, in accordance with the provisions and requirements of the act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, relinquish and convey unto the United States of America, those certain tracts of land hereinbefore in

paragraph III of this amended complaint, and recorded the deed of conveyance in the office of the recorder of the county in which the said lands are situated, and subsequently, and on the 8th day of February, 1904, filed with the Register and Receiver of the United States land office at Lakeview, Oregon, the said deed so recorded, together with a full, true, and correct abstract of title of the lands so relinquished, duly certified as such by the county recorder of the county in which the lands are situated, which abstract of title showed him to be the owner in fee simple of said lands, free and clear of any lien or incumbrances, immediately prior to the time the deed to the United States was recorded, and thereupon and at the same time selected in lieu of said lands so relinquished,

> Lot one (1), section two (2), township thirty-seven (37) south, range ten (10) east of the Willamette Meridian,

together with other lands, which selection so made was prior in time to the selection or entry of any other person or persons whomsoever, and, by virtue of said selection, there was initiated a right and interest prior in time and superior in right as against all persons whomsoever.

VIII.

And thereupon your orator shows unto your Honors:

That regardless of said selection so made as alleged in paragraph VII of this amended compalint, the defendant did, on the 7th day of November, 1908, attempt to make a soldier's additional homestead entry upon the land described in paragraph V of this amended complaint.

IX.

And thereupon your orator further shows unto your Honors:

That on or about the 20th day of June, 1932, the state of Oregon filed upon the said tracts as selected, together with certain other lands, certain instruments purporting to be school indemnity lists, which lists were numbered lists 170 and 168, respectively, which said lists were duly and regularly accepted and filed by the Register and Receiver of the United States land office at Lakeview, Oregon, and thereupon were regularly transmitted to the Commissioner of the General Land Office of the United States government at Washington, D. C., to await the acceptance and approval of the land department of the United States government, but that, owing to the invalid character of the base lands tendered in said lists, the said lists were held for cancellation, and were subsequently cancelled upon relinquishments of said lists filed on behalf of the state of Oregon, on the 8th day of February, 1936.

X.

And thereupon your orator further shows unto your Honors:

That prior to the said cancellation of said school indemnity lists 170 and 168, and before any action whatsoever had been taken by the proper officers of the land department of the United States, except said Register and said Receiver, relative to the acceptance and rejection of the said indemnity lists, the state of Oregon, acting through the officers of the Oregon state land board, said to various bona fide purchasers, for value,

[illegible] upon which the said school indemnity lieu [illegible] and [illegible] had been filed, and the said state had not at the time of such sale, nor has it at any time since ever acquired or owned any right, title, or interest in or to the said lands upon which the said lieu were filed, including those lands more particularly described in paragraph V of the amended bill of complaint, which said lands described in said paragraph V were, for a valuable consideration, and in good faith, and without any knowledge whatsoever of the irregularity of the proceedings which had taken place in connection with the said forest, or of the invalid character of the base lands which were tendered to the Federal government as the basis for the said selection by the state of Oregon, purchased from the said state of Oregon by the plaintiff herein.

VII.

And thereupon your orator further shows unto your Honor:

That subsequently and upon the discovery of the [illegible] of the proceedings in connection with the attempt to acquire said lands by filing of said lieu [illegible] as [illegible], and more particularly those lands hereinbefore described in paragraph V of the amended bill of complaint, were irregular, and that by virtue of the filing of said lieu the state of Oregon had acquired no interest and did not then have any right, title, or interest in or to the said lands so selected, owing to the invalid character of the base land which had been tendered in exchange therefor, and he further [illegible] that the said selected land had, nevertheless, been sold by the

state of Oregon to many innocent purchasers for value, the state of Oregon, acting through the Honorable George E. Chamberlain, its governor, entered into negotiations with the Department of the Interior of the United States, for the purpose of arriving at some arrangement wherein and whereby the interest of these bona fide purchasers from the state might be protected, and as a result of such negotiations, and on or about the 17th day of October, 1903, a letter was promulgated and transmitted to the governor of the state of Oregon by the Honorable Secretary of the Interior of the United States, of which letter the following is in part substantially a copy, to-wit:

> 'It (the state) may within sixty days allowed for appeal amend its selection by the substitution of a valid base, or, if unable to furnish such a base, it may, upon receipt of notice that the selection is held for cancellation, make a formal relinquishment of the selection, and give same to its grantee. While the selection is of record uncancelled the land is segregated thereby, and no right can be acquired by the presentation of an application therefor (*29* L. D. 29), but the purchaser holding the state's relinquishment may present it with his application, and thereby secure the right of entry."

XII.

And thereupon your orator further shows unto your Honors:

That thereafter and in accordance with the terms of the arrangement thus agreed upon, as evidenced by the

said letter of the Secretary of the Interior, the said lieu selection so made as alleged in paragraph VII of this amended bill of complaint was made by the said Edward B. Perrin, P. S. Brumby, his attorney in fact, in the interest and for the benefit of the plaintiff herein, and for the purpose of protecting the interests of the plaintiff in and to said selected land acquired by virtue of the purchase so made by the plaintiff from the state of Oregon, as alleged in paragraph X of this amended complaint, and at the time of making said lieu selection so made as alleged in said paragraph VII, and on the 8th day of February, 1904, the said lieu selector, the said Edward B. Perrin, by P. S.Brumby, his attorney in fact, presented, simultaneously with and together with the selections, as in paragraph VII of this amended complaint alleged, a relinquishment from the state of Oregon of all its right, title, and interest in and to the said selected land, which said relinquishment was made by the state of Oregon in the interest and for the benefit of the plaintiff herein, as grantee, which relinquishment is the same relinquishment referred to in paragraph IX hereof.

XIII.

And thereupon your orator further shows unto your Honors:

That the said forest lieu selections, so made as alleged in paragraph VII of this amended bill of complaint, was in all respects regular and in accordance with the requirements of said act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, and in accordance with the requirements of the Secretary of the Interior in his letter of Octo-

ber 17, 1903, hereinbefore set forth in paragraph XI of this amended bill of complaint, and the local officers of the United States land office at Lakeview, Oregon, did, on the 8th day of February, 1904, accept and file the said lieu selection, so made as aforesaid in paragraph VII of this amended bill of complaint, and did, on the 4th day of March, 1904, and at subsequent dates, attempt to reject said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, and stated, as a basis for said attempted rejection, that the said lieu selection was in conflict with certain homestead applications, which were made subsequently to the 8th day of February, 1904, and subsequently to the presentation and filing of the lieu selection, together with the relinquishment of the State of Oregon, as alleged in paragraphs VII and XII of this amended bill of complaint.

XIV.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 8 day of April, 1904, said lieu selector and the plaintiff herein, together with other lieu selectors who had made other selections in the interest and for the benefit of the plaintiff herein, appealed from the ruling of the local officers of the United States land office at Lakeview, Oregon, by which ruling the said local officers attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, upon which appeal the said ruling was affirm-

ed by the Commissioner of the General Land Office at Washington, D. C., on or about the 30 day of March, 1905, and subsequently, and on or about the 25th day of October, 1905, the Honorable Secretary of the Interior of the United States, acting through the Honorable Frank Pierce, first assistant secretary, reversed the said decision and ruling of the Commissioner of the General Land Office, and directed that said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections similarly made, be allowed as of the date on which they were filed, to-wit: the 8th day of February, 1904, and directed the Register and Receiver of the United States Land Office at Lakeview, Oregon, to allow said selections to remain of record as filed.

XV.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the 6th day of December, 1905, the local officers of the United States Land Office at Lakeview, Oregon, attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections, and alleged as a ground for said attempted rejection that the land covered by said selection had been withdrawn for the purpose of what was known as the Klamath River Project, and said action of the said Register and Receiver of the United States Land Office at Lakeview, Oregon, in attempting to reject said selection, was subsequent-

ly reversed by order and direction of the Commissioner of the General Land Office; made on the 23rd day of January, 1906, who ordered and directed that said lieu selection be allowed as of date February 8, 1904.

XVI.

And thereupon your orator further shows unto your Honors:

That on or about the 5th day of March, 1906, and the 11th day of June, 1906, the Register and Receiver of the United States Land Office at Lakeview, Oregon, made objections to the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, and attempted thereby to reject said lieu selection referred to in paragraph VII of this amended complaint, which attempted objections were sustained on appeal by the Commissioner of the General Land Office and by the Department of the Interior, on the 20th day of June, 1906, and subsequently and on or about the 15th day of May, 1907, the Department of the Interior of the United States recalled its attempted decision of June 20, 1906, and entered an order directing the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, as of the date on which said lieu selection was filed, to-wit: the 8th day of February, 1904, and ordered and directed that notice of such order be given to all parties who had made entries upon said lands subsequently to the filing of said lieu selection, so made

as alleged in paragraph VII of this amended complaint, which said notice was duly given as directed.

XVII.

And thereupon your orator further shows unto your Honors:

That subsequently, and as a result of the notice so given, a petition for a review of the departmental decision last referred to was filed on behalf of one Archie Johnson, a claimant of part of the said lands embraced by said indemnity lists 178 and 188, which petition set forth the existence of an alleged conspiracy, averred to have been formed for the purpose of acquiring all of the said lands, in the first instance, and that the said lieu selection, so made as aforesaid, was in accordance with, and constituted a part of, said alleged conspiracy, and that the plaintiff herein was not a purchaser in good faith of said land described in paragraph V of this amended complaint, or any part thereof, which petition for review was allowed, upon the ground that all previous hearings before the Department of the Interior, so had as hereinbefore alleged, were purely ex parte and were, consequently, not proper proceedings in which to determine the merits of the adverse claims to the lands in question, for the purpose of basing a final decision thereon, and, therefore, an order was made directing that a final hearing should be held before the Register and Receiver of the United States land office at Lakeview, Oregon, for the purpose of determining the respective merits of various claims to the lands embraced within the said school indemnity lists 178 and 188.

XVIII.

And thereupon your orator further shows unto your Honors:

That subsequently, and on o rabout the 25th day of May, 1908, said hearing so ordered, as aforesaid, was duly and regularly had before the Register and Receiver of the United States land office at Lakeview, Oregon, the plaintiff herein appearing in person and by attorneys, and the defendant and other adverse claimants appearing in person or by attorneys, at which time the said Register and Receiver, after duly hearing the respective parties, attempted to hold that the various homestead entries hereinbefore referred to in paragraph XIII of this amended complaint and particularly the entry of the defendant which was made on the 23rd day of November, 1906, should be allowed, which decision was subsequently, and on or about the 13th day of April, 1909, reversed by the Honorable Commissioner of the General Land Office, who held that the lieu selection referred to in paragraph VII of this amended complaint, together with other selections made in the interest of the plaintiff herein, had been duly and regularly made, and should be allowed to remain intact, upon the records of the United States Land Office, as of the date on which they were filed, to-wit, February 8, 1904.

XIX.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the .....

day of ....., 19....., an appeal from the decision of the Honorable Commissioner of the General Land Office, hereinbefore referred to in paragraph XVIII of this amended complaint, was taken by certain alleged homestead and timber and stone claimants, including the defendant, to the Department of the Interior of the United States, which department, acting through the Honorable Frank Pierce, its First Assistant Secretary, found that the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, were filed simultaneously with the relinquishment and cancellation of said indemnity lists 178 and 188, to-wit, on the 8th day of February, 1904, and before the attempted filing of the said alleged homestead and timber and stone entries, so made as alleged in paragraphs VIII and XIII of this amended complaint, and further found that the record then before said department fully showed, and every material fact supported the conclusion, that the plaintiff herein was a purchaser in good faith, free from fraud of any kind, and that the said alleged homestead and other entries, and particularly the entry of the defendant, were made subsequently to the 8th day of February, 1904, and after the filing of the lieu selection, so made as alleged in paragraph VII of this amended complaint, and that said lieu selection, so made as alleged in paragraph VII of this amended complaint, had been allowed by the Secretary of the Interior, as alleged in paragraphs XIV and XVI of this amended complaint, and had been al-

lowed by the Commissioner of the General Land Office, as alleged in paragraph XV of this amended complaint, and, based upon said findings, held that it was within the compentency of the officers of the land department of the United States to allow the said alleged homestead and timber and stone entries to be made after the filing of said lieu selections, so made as alleged in paragraph VII of this amended complaint, and the allowance of said selection, so made as alleged in paragraphs XIII and XIV and XV of this amended complaint, and further held that said lieu selection, so made and allowed, would be denied in all instances where the local officers of the United States Land Office at Lakeview, Oregon, had attempted to allow homestead and timber and stone entries to be made, a copy of which decision is hereunto attached and marked "Exhibit A," and, by reference, incorporated in and made a part of this amended complaint.

XX.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 21st day of March, 1912, and in accordance with the ruling of the decision hereinbefore referred to in paragraph XIX of this amended complaint, a patent to the following described lands, situated in the county of Klamath and state of Oregon, and particularly described as follows, to- wit:

Lot one (1), section two (2), township thirty-seven (37) south, range ten (10) east of the Willamette Meridian,

was issued in the name of Mason C. Meservey, the defendant herein, contrary to, and in violation of, the rights and equities of the plaintiff herein, and that the said patent so issued, as aforesaid, was issued by the officers of the United States government without regard to, and in contravention of, the vested rights of the plaintiff herein, and in accordance with the ruling of the Department of the Interior, as evidenced by the decision referred to in paragraph XIX of this amended complaint.

XXI.

And thereupon your orator further shows unto your Honors:

That this is a suit between citizens of different states, and that the amount in controversy herein exceeds the amount of three thousand ($3000.00) dollars, exclusive of interest and costs.

XXII.

And thereupon your orator further shows unto your Honors:

That he has no plain, adequate, or speedy remedy at law, but only in equity.

WHEREFORE, and forasmuch as your orator is

remediless in the premises, under and by strict rules of common law, and can only have relief in a court of equity where matters of this nature are recognizable, and reviewable, files this, his amended bill of complaint, and prays:

I. That the defendant may be adjudged and decreed to hold said lands described in paragraph V in trust for your orator, and to convey the same to your orator, and deliver to your orator any patent or other deeds of the same in her possession, and be restrained and enjoined from hereafter setting up any claim or title to said lands or any part thereof, or in any manner intermeddling therewith, or removing any timber or other product therefrom.

II. That the defendant may be adjudged and decreed to hold any timber or other product by him or his servants or agents removed from said land, or the proceeds or manufactured product from the same, in trust for your orator, and may be decreed to account to your orator for the same, or the value thereof, and to repay to your orator said value, with interest from date of sale, if the same has been sold by the said defendant.

III. That upon the failure of the defendant to make said conveyance and to deliver to your orator any patent or other deeds of the said lands described in said paragraph V, within a period of thirty days from the entry of the decree of this court, the said

decree be adjudged and decreed to stand as a conveyance in lieu of such patent or other deeds.

IV. And your orator further prays: That your Honors may grant unto your orator a writ of subpoena of the United States issued out of and under the seal of this Honorable Court, directed to the defendant, Mason C. Meservey, therein and thereby commanding said defendant, under a certain penalty therein to be named, personally to be and appear before your Honorable Court, then and there to answer, all and singular, (but not under oath, answer under oath being expressly waived), the matters and things aforesaid, and to stand and abide by and sustain such direction and decree as shall be made herein, as to your Honors shall seem equitable and just.

V. And your orator prays for such further relief in the premises as the nature and circumstances of this cause may require and to your Honorable Court may seem reasonable and proper.

And your orator, as in duty bound, will ever pray.

A. D. DANIELS.

By Platt & Platt and Hugh Montgomery, His Solicitors.

Hugh Montgomery,

of Counsel.

[Exhibit "A"]

D. C. M. G. B. G.

DEPARTMENT OF INTERIOR.

Washington, Feb. 17, 1910.

E.-932.

Aston Land & Cattle Company, Ltd.
E. B. Fenton
Lieu Selections,
A. D. Daniels,
Claimant of Benefical Interest,
vs.
Archie Johnson, et al,
Intervenors.
The Commissioner
Of the General Land Office.

Sir:

This is the appeal of Archie Johnson, et al., intervenors, from your office decision of April 15, 1909, sustaining the claim of A. D. Daniels, beneficiary under Lieu Selections, Nos. 13016, 13017 and 18, (Serials 07514, 07515, 07516) for certain described lands in the Lakeview Land District, Oregon. Questions affecting the validity of these selections have been subject of numerous decisions of the Land Department, and a detail statement of such proceedings covering a period of more than eight years, must of necessity be set out

to detail, if the issues are presented may be properly understood.

January 28, 1902, the lands involved were situated by the State of Oregon, per school indemnity lieu Nos. 179 and 180 these lieu were held for cancellation by your office, because of invalid base, and were finally cancelled in March and August, 1906, upon relinquishments filed on behalf of the state. The date of the filing of these relinquishments is one of the disputed questions in this record and while not necessarily controlling, it is in view of this case important, and will be considered as to merits in the progress of this paper.

For present purposes, it will be enough to say that the local officers and your office have found that it was filed Feb. 10, 1903, whereas it is claimed on behalf of A. D. Daniels, owner of the Southeast quarter of section 2 [illegible] Land Districts of [illegible] that it was filed Feb. 6, 1903. However the case by the Forest Land Selections to question even that it will be found that Feb. 6, 1903, has been rejected by the local officers in a letter to one C. C. Dietz, March 6, 1903, for conflict with certain homestead and timber and stone applications for part of the same lands. These Forest Land Selections were filed by Dietz in the name of Edward S. Rivers, and Pacific Land and Cattle Co. for the said C. D. Daniels was the beneficial owner of the said, which was filed to be necessary to protect his position from the case under the aforesaid invalid indemnity Selection.

It appears your office affirmed the action of the

Register and Receiver, giving as further reason and justification thereof the fact, that the Lieu Selections were presented at the local land office prior to cancellation of said Indemnity School Selections, and even prior to the filing of the state's relinquishment. Upon appeal, however, from this action of your office, the Department, Oct. 25, 1905, reversed your office decision, stating while the appeal was pending an affidavit had been filed by A. D. Daniels in which he stated that he was the real party in interest and the equitable owner of the lands assigned as bases for the Lieu Selections; that after its selections of the lands as School Indemnity, the State of Oregon had sold them to sundry purchasers, who paid part of the purchase price and assigned the certificates of sale to him, and he was then the owner thereof; that he thereafter became doubtful as to the validity of the State selection, and in order to protect his interests obtained relinquishments from the State and caused them to be filed in the Local Land Office at Lakeview with Lieu Selections; that in so doing he relied upon your office report of Oct. 13, 1904, (1903) to the Secretary of the Interior; which report was transmitted by the Department to the Governor of Oregon Oct. 17, 1904 (1903).

Considering the appeal, the Department held that the case, was controlled by its decision in the California and Oregon Land Company, (33 L. D. 595), that this case was in all essential respects the same as that one, and remanded the case with directions to adjudicate it thereunder. The Lieu Selections having

been returned to the Register and Receiver for allowance in accordance with said decisions, they were again, on Dec. 6, 1905, rejected by the local officers, for the reason that the lands had been withdrawn by telegram of June 25, 1904, for the Klamath River project. This action of the Register and Receiver was reversed by your officer Jan. 23, 1906, and the selections were remanded to be entered of record as of date Feb. 8, 1904, the day on which they were originally presented, if no other objection appeared. Under dates of March 5, and June 11, 1906, the Register submitted full reports to your office upon the said applications; and stated there were objections to the allowance of the same, in that there were various homesteads and timber and stone applications which had been allowed subsequently to the cancellation of the state's list. The Register also referred to the fact that Daniels had caused a contest to be instituted against the State's selection, and questioned his good faith in the matter.

Separate appeals were taken by the Aztec Land and Cattle Company and Perrin from this action of the local officers, and the papers in connection with the application of the Aztec Company were transmitted to the Department by your office, letter of May 9, 1906, for further consideration in connection with the report of the local office.

Upon consideration of the matter thus presented, the Department held in its decision of June 26, 1906, that the facts failed to show that Daniels, was entitled to protection as a Bona Fide purchaser from the

state; that the State's selections were filed Jan. 28, 1902, while the lands were sold on Jan. 21st, preceding, at which they were public lands of the United States, and no one purchasing them could claim to be a Bona Fide purchaser from the State; that as late as Oct. 5, 1903, Daniels was not asserting that he was a purchaser in good faith from the State, but was acting adversely to it and attempting to contest the lists under which he later asked for recognition as a Bona Fide purchaser and for equitable relief; that this position then was inconsistent with the position later assumed: and if had since acquired assignments of the State's certificates of sale, he had done so with full knowledge of the invalidity of the State's claim; that the facts set forth above were fatal to his contention that he was a Bona Fide purchaser, and as such should be permitted to file the State's relinquishment and obtain precedence over others seeking to appropriate the lands under the General land laws; that to conceed to him this privilege under letters Oct. 17 & 13, 1903, mentioned above, would in effect, be to make such persons as from time to time might constitute the State Land Board, agents to dispose of the public lands of the United States, within the State, to such persons as they might favor by means of sales of public land as state land, the subsequent filing of the State's list invalid for want of sufficient base; the filing of the State's relinquishment, and the protection of the purchaser from the state by grace of the Land Department. The Department accordingly held in that decision that the lieu selection should be rejected.

A motion for review of said decision of June 26th, 1906, having been filed by Daniels, Department, on May 15 and 18, 1907, rendered decisions holding that while Daniels, was not, strictly speaking a Bona Fide purchaser from the State, because the Certificates of sale issued by the State antedated the filing of the School Indemnity Selections, and therefore were made at a time when there was no actual claim of the State pending, still Daniels had not purchased the land until the month of April, 1902, nearly three months after the lands had been actually selected by the State, and that having paid a valuable consideration for the lands in an honest belief that a title was being obtained, that was sufficient to constitute a Bona Fide Purchase.

The decision of June 26th, 1906, was therefore recalled, and it was ordered that the Lieu Selection should be reinstated.

In promulgating the decision last mentioned, your office returned the Lieu Selections to the Local Land Office for allowance, and instructed the Register and Receiver to notify all parties who had made entry of said lands subsequently to the cancellation of the State's list to show cause within sixty days why their entries should not be cancelled, because of conflict with said Lieu Selections as a result of which a petition termed, a motion for re-review of Departmental decisions of May 15, and 18, 1907, was filed on behalf of Archie. Johnson who claimed a part of the Lands under a sale made thereof under the Public Land Laws.

This petition or motion charged, in effect, that a conspiracy had been formed for the purpose of acquiring the lands originally by means of the State's selection involved: that the entire proceeding by which title was sought to be acquired was fraudulent, and that the parties thereto should not be allowed to perfect title to the lands, to the injury of those who in good faith had entered the same under the public land laws.

Considering this petition, the Department stated in its decision of August 10th, 1907, that its previous decisions had been ex parte, and that the last decision favorable to Daniels did not prevent your office ordering a hearing, or taking other action with respect to the disposition of the claims of others which might be materially affected by the re-instatement of the claim of Daniels; and the case was accordingly remanded to your office for further consideration, to the end that a full and thorough investigation might be made into the matter, and your office was expressly advised that the previous decisions of the Land Department should in no wise embarass your action in the premises.

A hearing was accordingly ordered; and after due notice to all parties concerned, that the same was had before the local land office, May 25, 1908, Daniels appearing in person and by attorney, and the other parties claiming an interest either in person or by an attorney. The Local Land Office found that the case was not similar in all respects to that of the California and Oregon Land Company cited above; that in

that case there were no intervening rights or equities of other parties, while in the case under consideration the lands had been entered by bona fide settlers or purchasers, to many of whom final certificates had issued and in some instances even Patents had been issued.

The Register and Receiver accordingly recommended that the Homestead and Timber and Stone Entries of the various parties in the case should be allowed to remain in tact. Daniels appealed to your office, whereby your said decision of April 13, 1909, the action of the Local Office was reversed, and it was held that the Lieu Selections should remain in tact.

An appeal on behalf of the Homestead and Timber and Stone claimants brings the case before the Department. Most of the applicants to purchase the lands from the State upon whose supposed initiative these selections were made were not persons in being, but were fictitious persons, usually designated as "Dummies."

But while this is so, there is no evidence in this record showing or tending to show, that Daniels, or any person in privity with him, in fact, was a party to or had any knowledge of the intended fraud; and every material fact in this record supports the conclusion that Daniels bought in good faith, the Certificates of sale issued by the State. He had never heard of these State's Selections until one McHale, a timber land speculator of whom he had no personal acquaintance, but who was known to him by reputation, had reported to him that there was a large body of timber

land for sale, at Klamath, Oregon; and upon McHale's representations, he constituted McHale his agent under powers which amounted to, co-partnership, and McHale went to Klamath Falls to fully investigate these lands and the title thereto. McHale had instructions from Daniels, among other things, to secure the services of an attorney upon the question of title.

He did so. The attorney after an examination of the certificates of sale, reported that the title was good, and McHale's inquiries into the character of the land being satisfactory the results of his investigations was reported to Daniels and the deal was closed, upon the payment by Daniels of $23,901.10 for the certificates, of sale, and the further payment to the State of the unpaid ballance of the purchase price thereon, amounting to $3,033.74. Daniels had no personal acquaintance with any of the parties to the transactions; and so far as it appears from this record, he had no knowledge, information or belief which should have caused him to question the bona fides, of the people with whom he was dealing, or cause him to suspect that there was irregularity in the transaction. Nor was there anything in his connection with subsequent events, in his efforts to acquire title to these lands which may reasonably be said to go to the good faith of his purchase. It appears that rumors were soon thereafter rife with reference to land frauds in Oregon in connection with its school land grant.

The rumors reached Daniels and he promptly investigated them, finding for the first time that his title was questionable, upon the advice of his attorney, he initiated a contest against the State's selections upon which his title rested, hoping thereby to protect his purchase by acquiring an equitable preference right.

As a result of this contest, the state refunded the money which he had paid it and put in the hands of his attorney a relinquishment to the United States of all rights under its selections. Daniels then caused said relinquishments to be filed in the District Land Office, together with the Lieu Selections. There was certainly nothing reprehensible in this proceeding. Moreover, it was taken upon certain suggestions made in your said report of October 13, 1903. This report was responsive to a letter from the Governor of Oregon, September 28, 1903, wherein the inquiry was made of this department as to the means of protecting bona fide purchasers of the school indemnity lands from the State in instances where the State's selections had been cancelled for invalid base. Your offices reported among other things, and this is the same report transmitted to the Governor of Oregon, Oct. 13, 1903, that as to such selections—

while the selection is of **record and uncancelled**, the land is segregated thereby, and no right can be acquired by the presentation of an applicaiton therefor (29 L. D. 29), but the purchaser holding the State's relinquishment may present it with his application and thereby secure right of entry.

This is also the plain holding of this Department in the
in California and Oregon Land Company, supra, and is precisely the course pursued by Daniels in this case. His contest against the State's selection was to that end. He secured the State's relinquishments and presented them with the aforesaid applications to scrip the land.

It is true the record shows that the relinquishments were not marked, filed, in the local office until Feb. 10, 1904, which was two days after the presentation of the scrip applications.

It is further shown that it was the custom in that office to note the filing of the relinquishments of entries and filings upon public lands on the same day they were received in the office; and a clerk in said office gives it as his opinion that if these relinquishments had been receved on February 8, instead of February 10, the filing would have been noted on the day they were received.

But it is evident from the facts and circumstances surrounding the incident that the scrip applications and the State's relinquishments were, in fact, filed simultaneously.

The filing was by mail, and the letter of transmittal was written by Daniel's attorney, the said L. T. Barrin.

The letter recites that it contains the relinquishments in question, and it was received at the local land office February 8. Moreover, the action of the local officers at the time in rejecting the proffered

scrip applications, is put upon the ground that part of the lands were covered by pending homestead and timber and stone applications, whereas if the State had not then relinquished its school indemnity selections, the local officers would surely have assigned this as the reason for rejection of said applications, because this reason would have applied to all of the lands involved, instead of only a small portion of them, as was the case with the reason assigned.

It is worthy of too, that there has not been found any correspondence or record which would indicate that if the said Barin, had left these relinquishments out of his letter by inadvertence, they were ever afterwards transmitted to the local land office, and no correspondence or record of correspondence showing that if he had been guilty of such inadvertence he was ever advised thereof by the local officers.

I conclude therefore, on this branch of the case that the relinquishments in question and the scrip applications were filed at the same time, as was suggested they might be, in your office report of September 28th, 1903, above quoted.

Under existing regulations, it was the duty of the Register and Receiver to forward these applications, and these relinquishments without action for the consideration and disposition of your office. This however, it has been seen, was not done.

The scrip applications were rejected, and the history of the case, hereinbefore set out, shows that these applications were kept alive by successive appeals,

and that the case was twice remanded to the local officers, with directions to allow the applications, but various reasons were assigned for the neglect or failure of the local officers to obey these instructions.

It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the Secretary had been carried out, it would have been done before the case became complicated by the counter-equitable considerations arising upon the unfortunate allowance of the Homestead and Timber and Stone entries for most of these lands. It is thought however, that in instances where the land department has permitted these entries and filings to go of record, where they have become closed transactions, the Department would not be justified in cancelling such entries and filing, for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition.

See Hoyt vs. Weyerhauser et al). (161 F. E. D., Rep., 324).

It appears however, from your office reports of Dec. 16, 1909, that there are approximately 107 quarter Sections of land involved in this case. Of these, twenty-eight are involved in homestead entries, four

in cash entries and homestead entries, twenty-four in cash entries, twenty-five in Timber and Stone sworn statements, twelve are free and unappropriated, eight of them do not appear to be covered by the Lieu Selections in question, and seven of them have been patented.

In view of what has been said, the claim of Daniels must be denied as to all of them except those covered by Timber and Stone sworn statements only, and those that are unappropriated, amounting to what seems to be, from your office reports, approximately thirty-seven quarter sections in all.

As to these lands, the Timber and Stone applicants have not put themselves in privity with the United States, and the Land Department has not entered in to such Contract with them as to preclude other disposition of the lands.

See Campbell vs. Weyerhauser et al (161 Fed. Rep., 332).

This being true, and believing that the equities of Daniels should be protected to the fullest extent consistent with equitable administration, I have to direct that the Scrip applications be allowed as to all tracts which have not been otherwise disposed of, and rejected as to such as now appear to be covered by Homestead and cash entries.

The decision appeal from is modified. The papers are herewith returned.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

Enclosures.

[Endorsed]: Amended Bill in Equity. Filed May 13, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of May, 1912, there was duly filed in said Court, a Demurrer, in words and figures as follows, to wit:

[Demurrer to Amended Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

MASON C. MESERVEY,

Defendant.

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF OREGON:

Demurrer of the above named defendant, Mason C. Meservey, to the amended bill of complaint of the above named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said amended bill of comlpaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said bill.

And for cause of demurrer shows:

I.

That it appears by the plaintiff's own showing by the said amended bill that he is not entitled to the

relief prayed by the said amended bill against this defendant.

II.

That the said amended bill of complaint is wholly without equity.

Wherefore, and for divers other good causes of remurrer appearing on the said amended bill, this defendant demurs thereto, and he prays the judgment of this Honorable Court whether he shall be compelled to make further or any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in his behalf sustained.

ARTHUR I. MOULTON,
P. A. LAFFERTY,
Solicitors for Defendant.

STATE OF OREGON,
County of Multnomah—ss.

I, Arthur I. Moulton, being first duly sworn, on oath say: That I am one of the solicitors for the defendant in the above entitled suit, and that in my opinion the foregoing demurrer is well founded in point of law.

ARTHUR I. MOULTON.

Subscribed and sworn to before me this 24th day of May, 1912.

]Seal.[P. A. LAFFERTY,
Notary Public for Oregon.

STATE OF OREGON,
County of Multnomah—ss.

I, Mason C. Meservey, being first duly sworn, on

oath say: That I am the defendant in the above entitled cause; that the foregoing demurrer is not interposed for the purpose of delay.

MASON C. MESERVEY.

Subscribed and sworn to before me this 24th day of May, 1912.

[Seal.] P. A. LAFFERTY,
Notary Public for Oregon.

[Endorsed]: Demurrer. Filed May 29, 1912.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 15 day of July, 1912, the same being the 12 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to wit:

[Decree.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,
Plaintiff,

vs.

MASON C. MESERVEY,
Defendant.

This cause came on to be heard on the demurrer of the defendant to the amended bill in equity of the plaintiff herein, and the plaintiff appeared by his attorneys, Platt & Platt and Hugh Montgomery, and the defendant appeared by his attorneys Arthur I.

Moulton and P. A. Lafferty, and the court having heard the arguments of counsel for the respective parties, and having taken the said cause under advisement, and fully considered the same, and now being fully advised therein, and it appearing to the court that the said demurrer is well taken and should be sustained,

It is therefore ordered, considered, adjudged and decreed by the court that the said demurrer be, and the same is hereby, in all respects, sustained, and that the amended bill of complaint of the plaintiff herein be, and the same is hereby dismissed, and that defendant herein have and recover of and from the said plaintiff his costs and disbursements taxed at .... Dollars.

Dated this 15 day of July, 1912.

R. S. BEAN,
Judge.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition for Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

MASON C. MESERVEY,

Defendant.

The above named plaintiff, conceiving himself aggrieved by the order and decree made and entered in the above entitled cause on the 15th day of July, 1912, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, papers, and proceedings and all things concerning the same, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon his filing a bond for the payment of all damages and costs if he fails to prosecute the said appeal to effect which bond shall act as a supersedeas bond.

A. D. DANIELS,

Platt & Platt and Hugh Montgomery, Solicitors for Plaintiff.

Hugh Montgomery,
of Counsel.

[Endorsed]: Petition for Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

[Assignments of Error.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

MASON C. MESERVEY,

Defendant.

Now on this 29th day of August, 1912, comes the above named plaintiff, A. D. Daniels, appearing by Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record, and says that in the record and proceedings of the above entitled Court, in the above entitled cause, and in the final order and decree entered therein on the 15th day of July, 1912, there is manifest error, and that said order and decree is erroneous and against the just rights of said plaintiff, and for error the said plaintiff assigns the following:

I.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the plaintiff, on the 8th day of April, 1904, made a valid forest lieu selection of the lands described in paragraph V of plaintiff..s amended bill filed in said cause under and in accordance with the provisions of the Act of Congress of June 4th, 1897, set forth in paragraph VI of plaintiff's amended bill of complaint.

II.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that by the admissions of the demurrer, the forest lieu selection of the plaintiff, made upon the lands described in paragraph V of his amended bill of complaint, was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly the defendant.

III.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the attempted homestead entry of the defendant was subsequent in time and inferior in right to the forest lieu selection of the plaintiff.

IV.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that, by the admissions of the demurrer, the forest lieu selections of the plaintiff had been approved by the proper officers of the United States government, which approval gave the plaintiff a vested interest in the land so selected.

V.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the alleged homestead entry of the defendant was made in contravention of the vested rights of the plaintiff herein.

VI.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the complainant was equitably entitled to be protected in the forest lieu selections which he had made on the lands described in paragraph V of his amended bill of complaint as against the claims of the defendant or any person or persons whomsoever.

VII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that, by the admissions of the demurrer, the plaintiff was equitably entitled to have the defendant declared a trustee for the plaintiff of the lands described in paragraph V of his amended bill of complaint.

VIII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint, in that it did not hold that the bill of complaint stated a good cause of action to which the defendant should be required to file his answer or plea.

IX.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint and decreeing that said amended bill of complaint be dismissed and allowing costs to the defendant.

WHEREFORE, the plaintiff and appellant prays that the decree of said court be reversed and such di-

rections be given that full force and efficacy may enure to the plaintiff by reason of the cause of suit set up in his amended bill of complaint filed in said cause; and that a decree be entered in accordance with the prayer of plaintiff's amended Bill of Complaint.

PLATT & PLATT and HUGH MONTGOMERY,
Solicitors for Plaintiff.

Hugh Montgomery,
of Counsel.

[Endorsed]: Assignment of Errors. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, an Order Allowing Appeal, in words and figures as follows, to wit:

[Order Allowing Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,
Plaintiff,

vs.

MASON C. MESERVEY,
Defendant.

This day came A. D. Daniels, plaintiff, appearing by Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record and presented his petition for an appeal and an assignment of errors accompanying

the same which petition, upon consideration of the court, is hereby allowed, and the court allows an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon the filing of a bond in the sum of $500 with good and sufficient surety to be approved by the court; and

It is further ordered that said bond shall act as a supersedeas bond, and

It is further ordered that a certified transcript of the record, and all proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

R. S. BEAN,

Dated this 29th day of August, 1912.

[Endorsed]: Order Allowing Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

MASON C. MESERVEY,

Defendant.

KNOW ALL MEN BY THESE PRESENTS:

That we, A. D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Mason C. Meservey, in the full and just sum of five hundred ($500) dollars, to be paid to the said Mason C. Meservey, his executors, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents;

Sealed with our seals this 29th day of August, A. D., 1912.

WHEREAS, lately at the District Court of the United States for the District of Oregon, in a suit pending in said court between A. D. Daniels, plaintiff, and Mason C. Meservey, defendant, a decree was rendered against said plaintiff, A. D. Daniels, and said A. D. Daniels having petitioned an appeal and filed a copy thereof in the clerk's office in said court to reverse the same in the aforesaid suit, and a citation directed to the said Mason C. Meservey citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be holden in the city of San Francisco in said Circuit, on the 28th day of September, A. D., 1912, having been served on said defendant;

NOW the condition of this obligation is such, that if the said A. D. Daniels shall prosecute his appeal to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation

to be void, else to remain in full force and virtue.

A. D. DANIELS,
By Platt & Platt, His Solicitors of Record.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

[Seal.] By HARRISON G. PLATT,
Attorney in Fact
By W. J. Clemens,
Agent.

Examined and approved this 29th day of August, 1912.

R. S. BEAN,
District Judge.

[Endorsed]: Bond on Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of August, 1912, there was duly filed in said Court, a Citation on Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

A. D. DANIELS,
Appellant,

vs.

MASON C. MESERVEY,
Appellee.

UNITED STATES OF AMERICA,
Ninth Judicial Circuit—ss.

TO MASON C. MESERVEY, GREETING:

WHEREAS, A. D. Daniels, appellant in the above entitled suit has lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from a decree lately rendered in the District Court of the United States for the District of Oregon, made in favor of you, the said Mason C. Meservey, and has filed the security required by law; you are therefore hereby cited to appear before the said United States Circuit Court of Appeals at the City of San Francisco, State of California, on the 28th day of September, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the City of Portland in the Ninth Judicial Circuit this 29th day of August, in the year of our Lord, one thousand nine hundred twelve.

R. S. BEAN,
Judge of the District Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,
District of Oregon—ss.

Due service of the within Citation to Appellee by certified copy thereof as required by law is hereby acknowledged at Portland, Oregon, this 30th day of August, 1912.

ARTHUR I. MOULTON,
of Attorneys for Appellee.

[Endorsed]: Citation to Appellee. Filed Aug. 30, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Saturday, the 28 day of September, 1912, the same being the 77 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

MASON C. MESERVEY,

No. 5467.

September 28, 1912.

Now, at this day, for good cause shown, it is ORDERED that the plaintiff's time for filing and docketing the record on appeal in this cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same is hereby enlarged and extended ninety (90) days from this date.

R. S. BEAN,
Judge.

No. 2224

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

A. D. DANIELS,

Appellant,

vs.

MASON C. MESERVEY,

Appellee.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

At a stated term, to wit, the October Term A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2224.

A. D. DANIELS,

Appellant,

vs.

MASON C. MESERVEY,

Appellee.

Order of Submission in U. S. Circuit Court of Appeals.

ORDERED, appeal in the above-entitled cause argued by Mr. Hugh Montgomery, counsel for the appellant, and by Mr. Arthur I. Moulton, counsel for the appellee, and submitted to the Court for consideration and decision.

In the United States Circuit Court of Appeals for the Ninth Circuit.

A. D. DANIELS,

Appellant,

vs.

JESSIE E. WAGNER,

Appellee.

Opinion U. S. Circuit Court of Appeals.

PLATT & PLATT and HUGH MONTGOMERY, for the Appellant.

ANGELL & FISHER, F. H. MILLS, ARTHUR I. MOULTON and P. A. LAFFERTY, for the Appellees.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

The decision in this case involves the merits of sixteen suits pending in this court on appeal, in all of which A. D. Daniels, the appellant, was the complainant in the court below. The object of each suit was to obtain a decree declaring the defendants therein holders of the legal title to the land described in each case as trustees for said complainant. Demurrers to the bills for want of equity were sustained, and from the decrees thereupon rendered dismissing the bills, the appeals are taken.

The allegations in the bills are substantially the same. In the case which is above-entitled the allegations are in substance the following: That on and prior to April 12, 1902, Edward B. Perrin and the Aztec Land & Cattle Company, Ltd., a corporation,

each owned certain lands in fee simple in the Territory of Arizona; that on that date those lands were included within the limits of the San Francisco Mountains Forest Reserves, and that thereafter, on February 2, 1904, under the provisions of the Act of Congress of June 4, 1897, the said land owners relinquished and conveyed to the United States their interest in said lands, and on February 8, 1904, they made lieu selections of certain public lands in Klamath County, Oregon, for the benefit of the complainant; that the selections were perfected by presenting the recorded deed, together with a full, true and correct abstract of title showing that the selectors were the owners in fee simple of the lands relinquished; that on or about June 28, 1902, the State of Oregon had filed upon the lands so selected certain instruments purporting to be school indemnity lists, and before the approval of the lists, had sold the lands to the complainant, but that thereafter, owing to the invalid character of the base lands tendered in said lists, the lists were held for cancellation, and in March and August, 1904, were finally cancelled and relinquishments of said lists were filed on behalf of the State of Oregon; that prior to such cancellation, the State of Oregon acting through the officers of the State Land Board, sold to various *bona fide* purchasers for value the timber lands upon which the said school indemnity lists had been filed, and that the appellant in good faith purchased the said lands from the State of Oregon; that thereafter, discovering that the State had no right, title or interest in said lands so conveyed, the forest lieu selections al-

ready referred to were made for the purpose of protecting complainant's interest in said lands; that at the time of making their selections, the selectors filed with their selections relinquishments from the State of Oregon of any rights which it might have acquired by virtue of the school indemnity lists so filed by it; that after making such lieu selections and filing such relinquishments, the officers of the Land Office at Lakeview, Oregon, having allowed other entries to be made upon the lands so selected by homestead, timber and stone applications for the lands, rejected the selections so made by the complainant's predecessors in interest; that upon appeal to the Commissioner of the General Land Office, the action of the Register and Receiver at Lakeview was affirmed; that the Commissioner advanced as a further reason for the rejection that at the time when the lieu selections were presented at the local land office, the State indemnity school selections had not been cancelled or relinquished; that the State of Oregon executed relinquishments and the same were filed in the Land Office, bearing the file-mark of February 10, 1904; that the relinquishments were forwarded to the Commissioner of the General Land Office, and on March 7, 1904, he advised the Register and Receiver at Lakeview that the relinquishments had been received, and directed them to make due notation that the lists were cancelled, "leaving the lands open to entry by the first legal applicants"; that thereafter the appellee made application for the land at the local land office, and his filing was accepted; that thereafter various proceedings were had in the Land Department, con-

cerning the land so entered, and on August 10, 1907, the Secretary of the Interior instructed the Commissioner to order a hearing, that a full investigation might be had of the whole matter; that upon the hearing the local land office found that the lands had been entered by *bona fide* settlers or purchasers, to many of whom certificates, and in some instances, patents had issued; that the Register and Receiver accordingly recommended that such entries be allowed to remain, and the Secretary of the Interior finally so decided on February 17, 1910, holding that the greater equities were with the Homestead and Stone and Timber entrymen, and that in the discretion of the Secretary, such entries might be protected against the right of the scrip applications, and said: "It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons, and having done so, Daniels will not now be heard to question the correctness of that disposition."

GILBERT, Circuit Judge, after stating the case:

The appellant contends that by virtue of his offer to select the lands in question, and the tender in exchange therefor of a deed and abstract of title to the lands offered for surrender, he thereby became the equitable owner of the lands so sought to be selected, notwithstanding that his selection was rejected by the officers of the local land office, and that their rejection was affirmed by the Secretary of the Interior,

and that the patent having issued to the appellees, when in equity and good conscience, and according to law, it should have gone to the appellant, the Court should convert the holder of the legal title into a trustee for the appellant, and compel conveyance of the legal title to him.

In considering, in the light of the adjudications, the question here presented, it is essential to bear in mind the distinction between the right acquired by a Railroad Company, under a congressional grant of lands to aid the construction of a railroad, to select within the indemnity limits lands in lieu of those which are lost in the place limits, and the right of a lieu land selector under the Act of June 4, 1897. The former is a substantial right in the lands lying in the indemnity limits, given in consideration of the construction of a railroad, and is confined to specific lands within certain boundaries which are defined in the grant. It is a vested right, of which the grantee could not be deprived, by an Act of Congress or by other authority. In Weyerhaeuser vs. Hoyt, 219 U. S. 387, the Court declared that it was the intention of Congress in making such a grant, "to confer a substantial right to land within the indemnity limits in lieu of land lost within the place limits." The right of selection of lieu land given under the Act of June 4, 1897, however, is in the first instance but an offer by the Government to exchange lands. It is based upon no valuable consideration actually received. It attaches to no specific lands, nor to lands within any defined limits. It does not attach upon the mere presentation of the requisite papers. It at-

taches only when the authorized officers of the Government accept the offer to exchange. Nor is it true that the filing of the lieu selection papers and the acceptance of the same by the local Land Office segregates the land upon which the filing is made so as to cut off intervening and subsequent rights as against the lieu selectors. In Roughton vs. Knight, 219 U. S. 537–547, in construing the Act of June 4, 1897, the Court said: "Manifestly there must be an acceptance of the relinquishment by someone authorized to decide upon its sufficiency, and an assent to the particular selection made in lieu." In Cosmos Exploration Co. vs. Gray Eagle Oil Co., 190 U. S. 310, lieu land had been selected under the Act of June 4, 1897. The selector complied with the provisions of the Act. His selection was received and accepted, and entered on the records of the local land office. At that time there was no adverse claim. Before the issuance of a patent, the selector's grantee brought a suit against the defendants, who had entered the land as a mineral claim, he claiming that his grantor had become vested with the complete equitable title to the land so selected, and had become entitled to receive a patent. The Court held that it had no jurisdiction prior to the issuance of the patent, to determine who was entitled to receive it, and that under the Act of June 4, 1897, the officers of the local land office had no authority to decide whether the selector had complied with the provisions of the Act, that authority being vested in the Commissioner of the General Land Office. The Court said: "But even the complete equitable title asserted by a complainant must,

as it would seem, be based upon the alleged right of the local land officers to accept the deed and approve the selection, even though such approval may be thereafter the subject of a review in the nature of an appeal from the action of the local officers. There must be a decision made somewhere regarding the rights asserted by the selector of land under the Act before a complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the statute, and the selector cannot decide the question for himself. We do not see how it can be successfully maintained that without any decision by any official representing the Government, and by merely filing the deed relinquishing to the Government a tract of forest reserve land, and assuming to select a similar area of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land." It is urged that this language of the Court is *dictum*, but we do not so regard it. It contains the reasoning of the Court in determining the nature of the rights of the complainant in that case. But if, indeed, it is true that the expression of such views was unnecessary to the determination of the case which was before the Court, the language used sets forth the mature and unanimous judgment of the members of that court on the question of law which is involved in the case at bar, and we deem it controlling in the decision of the present case.

Nor do we find ground to sustain the appellant's contention that the views of the Court so expressed

in the Cosmos Exploration Company case have been modified by the decision in Weyerhaeuser vs. Hoyt, 219 U. S. 380. That was a case which involved the right of a railroad company to select lands within the indemnity limits of its grant. The Court held that selections of lieu lands filed with the Secretary of the Interior excluded the right of others to appropriate the lands embraced therein pending action by the Secretary, and that the railroad company's rights to such lieu lands so selected were superior to those of a purchaser under the Timber and Stone Act who filed pending final decision by the Secretary, and that the final decision by the Secretary related back to the date of the original selections. Prior to that time, the Court had said, in New Orleans Pacific Ry. Co. vs. Parker, 143 U. S. 57: "As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected by the grantee and approved by the Secretary of the Interior." The same was held in Humbird vs. Avery, 195 U. S. 507. In Wisconsin Central Ry. Co. vs. Price County, 133 U. S. 496, 512, the Court said: "Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title"; and in Sjoli vs. Dreschel, 199 U. S. 565, the Court held it to be established doctrine "that no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior; that up to the time such approval is given, lands within indem-

nity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and, That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road." In the Weyerhaeuser case, the Court distinguished the Sjoli case by saying that it belonged to a class of cases in which there was no question of right by relation involved, and that the general language which we have quoted from the opinion was to be considered in view of the questions which were presented in that case, and that to apply it in the Weyerhaeuser case would be in effect to destroy the indemnity provisions of the Granting Act. No reference was made to the decision in the Cosmos Exploration Company case, and this was evidently for the reason that the language of the Court in that case was deemed to be applicable solely to the right of selection granted by the Act of June 4, 1897, and that the Court recognized and intended to reaffirm the vital distinction which it had found between such rights and the rights of a selector of indemnity lands under a grant to a railway company in aid of the construction of its road. Stalker vs. Oregon Short Line, 225 U. S. 142, is in line with Weyerhaeuser vs. Hoyt and so is Svor vs. Morris, 227 U. S. 524. We consider the decision in the Cosmos Exploration Company case authority for sustaining the decree of the

court below. But there is additional ground for sustaining it in the fact that, at the time when the appellant's selection was initiated on February 8, 1904, the lands involved herein appeared upon the records of the local land office as selected by the State of Oregon by certain school indemnity lists, and that those lists were not relinquished by the state until February 10, 1904. This sufficiently appears from the decision of the Secretary of the Interior, which is made an exhibit to the bill and is controlling in so far as it varies from the allegations of the bill. Greenameyer vs. Coate, 212 U. S. 434, 443.

The decree in each of the sixteen suits, Nos. 2212–2227, is affirmed.

[Endorsed]: Filed May 5, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2224.

A. D. DANIELS,

Appellant,

vs.

MASON C. MESERVEY,

Appellee.

Decree, U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the District Court of the United

States for the District of Oregon and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered, May 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Petition for Allowance of Appeal to Supreme Court of the United States.

PETITION FOR APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

The above-mentioned appellant, A. D. Daniels, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit and that a decree has therein been rendered, on the fifth day of May, A. D. 1913, affirming the decree of the District Court of the United States for the District of Oregon, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs; that this cause is one involving the construction and application of

a statute of the United States, to wit, Act of June 4, 1897, 30 Statutes at Large, 36 (U. S. Comp. Stats. 1901, p. 1541), and in which the decree of the United States Circuit Court of Appeals for the Ninth Circuit is not final, and is a proper cause to be appealed to the Supreme Court of the United States.

The above-named appellant, conceiving himself aggrieved by the decree made and entered in the above-entitled court and cause on the fifth day of May, 1913, does hereby appeal from said decree to the United States Supreme Court, for the reasons specified in the assignment of errors, which is filed herewith.

WHEREFORE, the said appellant prays that an appeal be allowed him in the above-entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors, herewith filed by the said appellant, may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

PLATT & PLATT,
Solicitors for Appellant.

[Endorsed]: Filed Jun. 2, 1913. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Title of Court and Cause.]

Assignment of Errors on Appeal to Supreme Court of the United States.

COMES NOW the appellant, A. D. Daniels, by Platt & Platt, his solicitors, and says that in the record and proceedings herein there is manifest error, and assigns error thereto as follows:

The United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the decree of the United States District Court for the District of Oregon sustaining the demurrer of appellee to appellant's amended bill of complaint and dismissing appellant's amended bill of complaint:

First. Because the demurrer to appellant's amended bill of complaint admits that on the 8th day of February, 1904, the appellant made a valid forest lieu selection of the land, described in paragraph V of appellant's amended bill filed in said cause, under and in accordance with the provision of the Act of Congress of June 4, 1897, set forth in paragraph VI of appellant's amended bill of complaint.

Second. Because the demurrer to appellant's amended bill of complaint admits that the forest lieu selection of appellant, made upon the lands described in paragraph V of his amended bill of complaint, was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly to that of the appellee.

Third. Because the demurrer to appellant's amended bill of complaint admits that the attempted soldier's additional homestead entry of the appellee

was subsequent in time and inferior in right to the forest lieu selection of appellant.

Fourth. Because the demurrer to appellant's amended bill of complaint admits that the forest lieu selections of appellant had been approved by the proper officers of the United States Government, which approval gave appellant a vested interest in the land so selected.

Fifth. Because the demurrer to appellant's amended bill of complaint admits that the alleged soldier's additional homestead entry of the appellee was made in contravention of the vested rights of the appellant herein to the land described in paragraph V of appellant's amended bill of complaint.

Sixth. Because the demurrer to appellant's amended bill of complaint admits that the appellant was equitably entitled to be protected in the forest lieu selection which he had made on the lands described in paragraph V of his amended bill of complaint as against the claims of the appellee, or any person or persons whatsoever.

Seventh. Because the demurrer to appellant's amended bill of complaint admits that the appellant was equitably entitled to have the appellee declared a trustee, for the appellant, of the lands described in paragraph V of appellant's amended bill of complaint.

Eighth. Because the demurrer to appellant's amended bill of complaint admits that the Oregon school indemnity lists, covering the lands described in paragraph V of appellant's amended bill of complaint, were relinquished simultaneously with the fil-

ing of the forest lieu selections by appellant.

Ninth. Because the demurrer to appellant's amended bill of complaint admits that the relinquishments of the Oregon School indemnity lists were filed on February 8, 1904.

Tenth. Because the appellant's amended bill of complaint stated a good cause of suit to which the appellee should have been required to file his answer or plea.

Eleventh. Because the decree of said District Court should have been reversed and the demurrer to appellant's amended bill of complaint overruled.

WHEREFORE, the appellant prays that the decree of the United States Circuit Court of Appeals for the Ninth Circuit be reversed, and such directions be given that force and efficacy may inure to the appellant by reason of the cause of suit set up in his amended bill of complaint filed in said cause, and that a decree be entered in accordance with the prayer of appellant's amended bill of complaint.

PLATT & PLATT,
Solicitors for Appellant.

[Endorsed]: Filed Jun. 2, 1913. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Title of Court and Cause.]

Order Allowing Appeal to Supreme Court U. S. and Fixing Amount of Bond.

IT IS HEREBY ORDERED, that the appeal in the above-entitled case to the Supreme Court of

the United States be, and the same is hereby, allowed as prayed.

AND IT IS FURTHER ORDERED that the amount of the appeal and supersedeas bond be, and the same hereby is, fixed at $500.00.

Dated this 3d day of June, 1913.

WM. B. GILBERT,

United States Circuit Judge, Ninth Circuit.

[Endorsed]: Filed Jun. 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Bond on Appeal to Supreme Court U. S.

KNOW ALL MEN BY THESE PRESENTS, that we, A. D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Mason C. Meservey, in the full and just sum of Five Hundred Dollars ($500.00), lawful money of the United States of America, to be paid to the said Mason C. Meservey, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals this 3d day of June, 1913.

WHEREAS, the appellant in the above-entitled suit is prosecuting an appeal to the United States Supreme Court to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Ninth Circuit on the 5th day of May, 1913;

NOW, THEREFORE, the condition of this obligation is such, that if the said appellant shall prosecute said appeal to effect, and answer all damages and costs if he fails to make said appeal good, then this obligation shall be void; otherwise to remain in full force and effect.

A. D. DANIELS. [Seal]
By PLATT & PLATT,
His Solicitors of Record.

FIDELITY & DEPOSIT COMPANY OF MARYLAND. [Seal]
By ROBERT. T. PLATT,
Attorney in Fact.
CHESTER W. HANSEN,
Agent.

Examined and approved this 3d day of June, 1913.
WM. B. GILBERT,
Circuit Judge for the Ninth Circuit.

[Endorsed]: Filed Jun. 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Praecipe for Record on Appeal to Supreme Court of the United States.

To the Clerk of the said Court:

Sir: Please issue a certified Transcript of the Record on appeal to the Supreme Court of the United States in the above-entitled cause, consisting of the following;

1. Copy of Printed Transcript of Record on which case was heard in the Circuit Court of Appeals, to

which will be added a Copy of the following-entitled papers that were filed, and of the Proceedings that were had in said Circuit Court of Appeals, viz.:

2. Order of Submission;

3. Opinion;

4. Decree;

5. Petition for Appeal to Supreme Court U. S.; and Order thereon;

6. Bond on Appeal to Supreme Court U. S.;

7. Assignment of Errors;

8. Praecipe for Certified Transcript of Record on Appeal to Supreme Court U. S.;

9. Certificate of Clerk U. S. C. C. A. to Transcript of Record on Appeal to Supreme Court U. S., and

10. Original Citation on Appeal to Supreme Court U. S.

PLATT & PLATT,
Solicitors for Appellant.

United States of America,
Ninth Judicial Circuit,—ss.

Due service of the within Praecipe for Transcript on Appeal to Supreme Court U. S. is hereby acknowledged, and certified copy thereof received, at Portland, Oregon, this 7th day of June, 1913.

ARTHUR I. MOULTON,
Of Solicitors for Appellee.

[Endorsed]: Filed Jun. 10, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2224.

A. D. DANIELS,

Appellant,

vs.

MASON C. MESERVEY,

Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record on Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-nine (69) pages, numbered from and including one (1) to and including sixty-nine (69), to be a full, true and correct copy of the complete record in the above-entitled cause, prepared pursuant to praecipe therefor filed by counsel for the appellant, including all proceedings had therein, and including the Opinion and the Assignment of Errors filed therein, as the same remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record in said cause on Appeal to the Supreme Court of the United States.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twentieth day of June, A. D. 1913.

[Seal] F. D. MONCKTON,

Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2224.

A. D. DANIELS,

Appellant,

vs.

MASON C. MESERVEY,

Appellee.

Citation on Appeal to Supreme Court U. S.

United States of America,
Ninth Circuit,—ss.

To Mason C. Meservey, Greetings:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, sixty (60) days after the date of this citation, pursuant to an appeal filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein A. D. Daniels is appellant and you are appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable W. B. GILBERT, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 6th day of June, A. D. 1913.

WM. B. GILBERT,
Circuit Judge.

United States of America,
Ninth Judicial Circuit,—ss.

Due service of the within Citation to appellee is hereby acknowledged, and certified copy thereof received, at Portland, Oregon, this 7th day of June, 1913.

ARTHUR I. MOULTON,
Of Solicitors for Appellee.

[Endorsed]: No. 2224. In the United States Circuit Court of Appeals for the Ninth Circuit. A. D. Daniels, Appellant, vs. Mason C. Meservey, Appellee. Citation. Filed Jun. 10, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed on Cover.]

File No. 23,826.

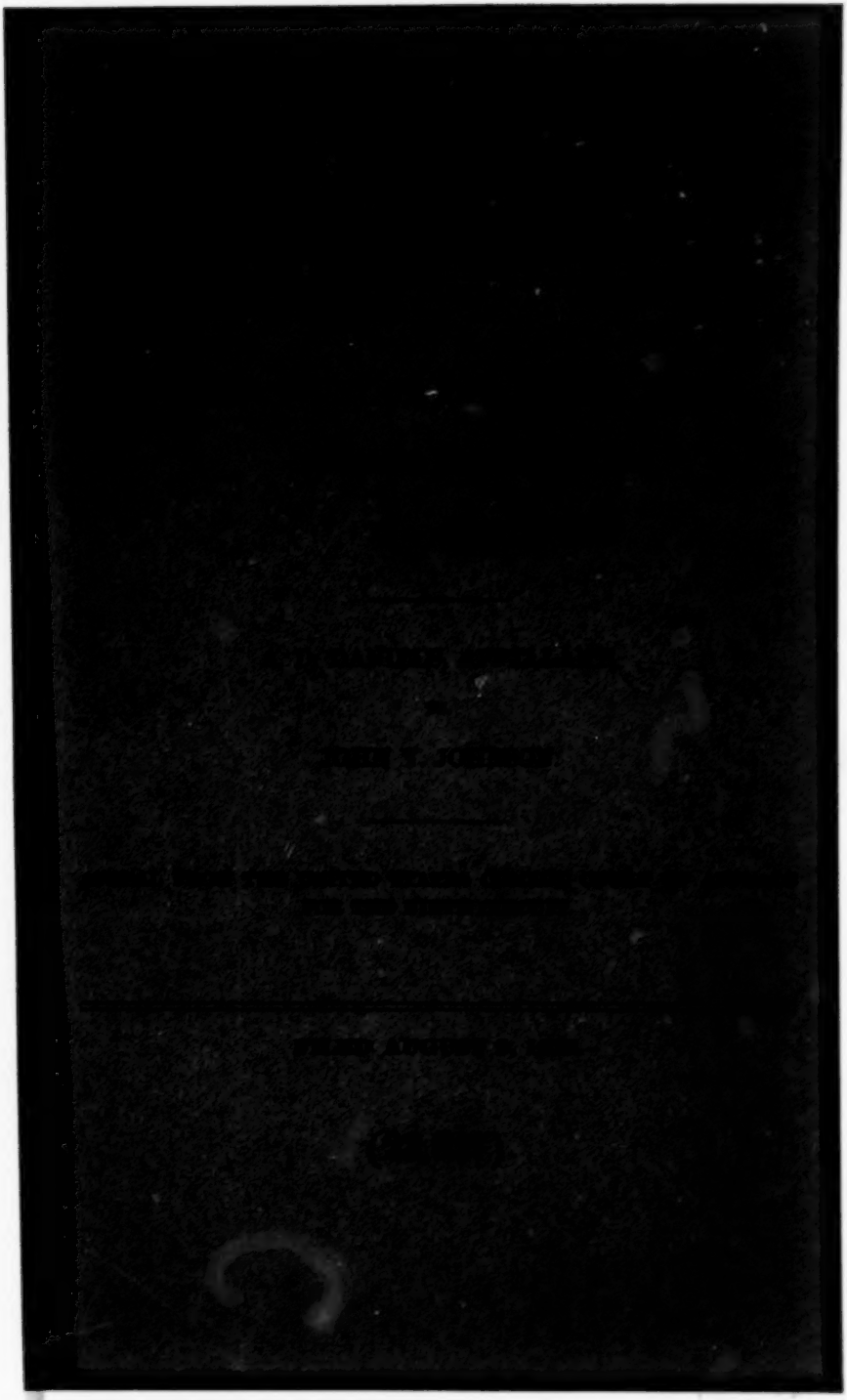
U. S. Circuit Court Appeals, 9th Circuit.

Term No. 675.

A. D. DANIELS, Appellant,
vs.
MASON C. MESERVEY.

Filed August 2d, 1913.

File No. 23,826.



(23,827)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 676.

A. D. DANIELS, APPELLANT,

vs.

JOHN Y. JOHNSON.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 25, 1913.

No. 2225

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

JOHN Y. JOHNSON,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon

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TRANSCRIPT OF RECORD.

LODGED
JAN - 2 1913
F. D. MONCKTON,
CLERK.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

JOHN Y. JOHNSON,

Appellee.

Names and Addresses of Attorneys Upon This Appeal:

For the Appellant:

PLATT & PLATT and HUGH MONTGOMERY,
Board of Trade Bldg., Portland, Oregon

For the Appellee:

ARTHUR I. MOULTON and H. M. MANNING,
Fenton Bldg., Portland, Oregon

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In the District Court of the United States for the District of Oregon.

Be it Remembered, That on the 17 day of May, 1912, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Bill of Complaint, in words and figures as follows, to wit:

[Amended Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JOHN Y. JOHNSON,

Defendant.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF OREGON:

A. D. Daniels, a citizen and inhabitant of the state of Wisconsin, residing at Rhinelander in said state, with leave of court first had and obtained, brings this, his amended bill of complaint, against John Y. Johnson, a resident and inhabitant of the State of Oregon, residing at Klamath Falls, in said state.

And thereupon your orator complains and says:

I.

That at all times herein mentioned plaintiff was and is a resident and inhabitant of the State of Wisconsin, residing at Rhinelander in said state.

II.

And thereupon your orator further shows unto your Honors:

That at all times herein mentioned defendant, John Y. Johnson, was, and is, a resident and inhabitant of the State of Oregon, residing at Klamath Falls in said state.

III.

And thereupon your orator further shows unto your Honors:

That on the 12th day of April, A. D. 1912, and immediately prior thereto, one Aztec Land and Cattle Company, Ltd., a corporation, was the owner in fee simple, free of any lien or incumbrances, of that certain property located in the Territory of Arizona, and particularly described as follows, to wit:

> All of section twenty-five, twenty-seven, and twenty-nine, township sixteen north, range ten east; and the southeast quarter of section three, township nineteen north, range nine east G. & S. R. M., Arizona,

and was the owner in fee simple of said property described in paragraph III of this amended complaint, up until the 2nd day of February, 1904.

IV.

And thereupon your orator further shows unto your Honors:

That on or about the 12th day of April, 1902, the said described lands, mentioned in paragraph III of this amended bill of complaint, were included within the limits of the San Francisco Mountains Forest Re-

serves, pursuant to a proclamation of the President of the United States made on or about the 12th day of April, 1902, which said lands were then, and still are, non-mineral lands.

V.

And thereupon your orator further shows unto your Honors:

That on or about the 8th day of February, 1904, that certain property situated within the District of Oregon, located in the County of Klamath in the State of Oregon, and particularly described as follows, to wit:

> The northwest quarter of the southeast quarter, and the northeast quarter of the southwest quarter, and the northwest quarter of the southwest quarter, section two, township thirty-seven south, range ten east of the Willamette Meridian,

was surveyed, unappropriated, and vacant public land of the United States, returned and characterized upon the official records of the United States as non-mineral land, free and open to entry and settlement under and in accordance with the laws of the United States governing the acquisition of public lands.

VI.

And thereupon your orator further shows unto your Honors:

That on or about the 4th day of June, 1897, the Congress of the United States passed an act entitled: "An act making appropriation for sundry civil expenses of the government, for the fiscal year ending

June 30, 1898, and for other purposes:" which act provides, among other things, as follows, to wit:

> "That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the tract selected: Provided further, That in cases of unperfected claims the requirements, of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claim."

VII.

And thereupon your orator further shows unto your Honors:

That on or about the 2nd day of February, 1904, the said Aztec Land and Cattle Company, Ltd., a corporation, acting by A. L. Veazie, its attorney in fact, in accordance with the provisions and requirements of the act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, relinquish and convey unto the United States of America those certain tracts of land hereinbefore described

in paragraph III of this amended complaint, and recorded the deed of conveyance in the office of the recorder of the county in which the said lands are situated, and subsequently, and on the 8th day of February, 1904, filed with the Register and Receiver of the United States land office at Lakeview, Oregon, the said deed so recorded, together with a full, true and correct abstract of title of the lands so relinquished, duly certified as such by the county recorder of the county in which the lands are situated, which abstract of title showed him to be the owner in fee simple of said lands, free and clear of any lien or incumbrances, immediately prior to the time the deed to the United States was recorded, and therupon and at the same time selected in lieu of said lands so relinquished.

> The northwest quarter of the southeast quarter, and the northeast quarter of the southwest quarter, and the northwest quarter of the southwest quarter, section two, township thirty-seven south, range ten east of the Willamette Meridian,

together with other lands, which selection so made was prior in time to the selection or entry of any other person or persons whomsoever, and, by virtue of said selection, there was initiated a right and interest prior in time and superior in right as against all persons whomsoever.

VIII.

And thereupon your orator further shows unto your Honors:

That regardless of said selection so made as alleged in paragraph VII of this amended complaint, the defendant did, on September 1, 1910, attempt to make a homestead entry upon the land described in paragraph VII of this amended complaint.

IX.

And thereupon your orator further shows unto your Honors:

That on or about the 28th day of June, 1902, the State of Oregon filed upon the said tract so selected, together with certain other lands, certain instruments purporting to be school indemnity lists, which lists were numbered Lists 178 and 188, respectively, which said lists were duly and regularly accepted and filed by the Register and Receiver of the United States land office at Lakeview, Oregon, and thereupon were regularly transmitted to the Commissioner of the General Land Office of the United States government at Washington, D. C., to await the acceptance and approval of the land department of the United States government, but that, owing to the invalid character of the base lands tendered in said lists, the said lists were held for cancellation, and were subsequently cancelled upon relinquishments of said list filed on behalf of the State of Oregon, on the 8th day of February, 1904.

X.

And thereupon your orator further shows unto your Honors:

That prior to the said cancellantion of said school indemnity lists 178 and 188, and before any action

whatsoever had been taken by the proper officers of the land department of the United States, except said Register and said Receiver, relative to the acceptance and rejection of the said indemnity lists, the state of Oregon, acting through the officers of the Oregon state land board, sold to various bona fide purchasers, for value, the timber lands upon which the said school indemnity lists 178 and 188 had been filed, and the said state had not at the time of such sale, nor has it at any time since ever acquired or owned any right, title, or interest in or to the said lands upon which the said lists were filed, including those lands more particularly described in paragraph V of this amended bill of complaint, which said lands described in said paragraph V were, for a valuable consideration, and in good faith, and without any knowledge whatsoever of the irregularity of the proceedings which had taken place in connection with the sale thereof, or of the invalid character of the base lands which were tendered to the Federal government as the basis for the said selection by the state of Oregon, purchased from the said State of Oregon by the plaintiff herein.

XI.

And thereupon your orator further shows unto your Honors:

That subsequently and upon the discovery of the fact that all the proceedings in connection with the attempt to acquire said lands by filing of said lists 178 and 188, so filed as aforesaid, and more particularly those lands hereinbefore described in paragraph

V of this amended bill of complaint, were irregular, and that by virtue of the filing of said lists the State of Oreogn had acquired no interest and did not then have any right, title, or interest in or to the said lands so selected, owing to the invalid character of the base land which had been tendered in exchange therefor, and the further fact that the said selected land had, nevertheless, been sold by the State of Oregon, to many innocent purchasers for value, the State of Oregon, acting through the Honorable George E. Chamberlain, its governor, entered into negotiations with the Department of the Interior of the United States, for the purpose of arriving at some arrangement wherein and whereby the interest of these bona fide purchasers from the state might be protected, and as a result of such negotiations, and on or about the 17th day of October, 1903, a letter was promulgated and transmitted to the governor of the State of Oregon by the Honorable Secretary of the Interior of the United States, of which letter the following is in part substantially a copy, to wit:

> "It (the state) may within sixty days allowed for appeal amend its selection by the substitution of a valid base, or, if unable to furnish such a base, it may, upon receipt of notice that the selection is held for cancellation, make a formal relinquishment of the selection, and give same to its grantee. While the selection is of record uncancelled the land is segregated thereby, and no right can be acquired by the presentation of an applica-

tion therefor (29 L. D. 29), but the purchaser holding the state's relinquishment may present it with his application, and thereby secure the right of entry."

XII.

And thereupon your orator further shows unto your Honors:

That thereafter and in accordance with the terms of the arrangement thus agreed upon, as evidenced by the said letter of the Secretary of the Interior, the said lieu selection so made as alleged in paragraph VII of this amended bill of complaint was made by the said Aztec Land and Cattle Company, Ltd., a corporation, by A. L. Veazie, its attorney in fact, in the interest and for the benefit of the plaintiff herein, and for the purpose of protecting the interests of the plaintiff in and to said selected land acquired by virtue of the purchase so made by the plaintiff from the State of Oregon, as alleged in paragraph X of this amended complaint, and at the time of making said lieu selection so made as alleged in said paragraph VII, and on the 8th day of February, 1904, the said lieu selector, the said Aztec Land and Cattle Company, Ltd., by A. L. Veazie, its attorney in fact, presented, simultaneously with and together with the selection as in paragraph VII of this amended complaint alleged, a relinquishment from the State of Oregon of all its right, title and interest in and to the said selected land, which said relinquishment was made by the State of Oregon in the interest and for the benefit of the plaintiff herein, as grantee, which relinquish-

ment is the same relinquishment referred to in paragraph IX hereof.

XIII.

And thereupon your orator further shows unto your Honors:

That the said forest lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, was in all respects regular and in accordance with the requirements of said Act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, and in accordance with the requirements of the Secretary of the Interior in his letter of October 17, 1903, hereinbefore set forth in paragraph XI of this amended bill of complaint, and the local officers of the United States land office at Lakeview, Oregon, did, on the 8th day of February, 1904, accept and file the said lieu selection, so made as aforesaid in paragraph VII of this amended bill of complaint, and did, on the 4th day of March, 1904, and at subsequent dates, attempt to reject said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, and stated, as a basis for said attempted rejection, that the said lieu selection was in conflict with certain homestead and timber and stone applications, which were made subsequently to the 8th day of February, 1904, and subsequently to the presentation and filing of the lieu selection, together with the relinquishment of the State of Oregon, as alleged in paragraphs VII and XII of this amended bill of complaint.

XIV.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 8th day of April, 1904, said lieu selector and the plaintiff herein, together with other lieu selectors who had made other selections in the interest and for the benefit of the plaintiff herein, appealed from the ruling of the local officers of the United States land office at Lakeview, Oregon, by which ruling the said local officers attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, upon which appeal the said ruling was affirmed by the Commissioner of the General Land Office at Washington, D. C., on or about the 30th day of March, 1905, and subsequently, and on or about the 25th day of October, 1905, the Honorable Secretary of the Interior of the United States, acting through the Honorable Frank Pierce, first assistant secretary, reversed the said decision and ruling of the Commissioner of the General Land Office, and directed that said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections similarly made, be allowed as of the date on which they were filed, to-wit, the 8th day of February, 1904, and directed the Register and Receiver of the United States Land Office at Lakeview, Oregon, to allow said selections to remain of record as filed.

XV.

And thereupon your orator further shows unto

your Honors:

That subsequently and on or about the 6th day of December, 1905, the local officers of the United States Land Office at Lakeview, Oregon, attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections, and alleged as a ground for said attempted rejection that the land covered by said selections had been withdrawn for the purpose of what was known as the Klamath River Project, and said action of the said Register and Receiver of the United States Land Office at Lakeview, Oregon, in attempting to reject said selections, was subsequently reversed by order and direction of the Commissioner of the General Land Office, made on the 23rd day of January, 1906, who ordered and directed that said lieu selection be allowed as of date February 8, 1904.

XVI.

And thereupon your orator further shows unto your Honors:

That on or about the 5th day of March, 1906, and the 11th day of June, 1906, the Register and Receiver of the United States Land Office at Lakeview, Oregon, made objections to the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, and attempted thereby to reject said lieu selection referred to in paragraph VII of this amended complaint, which attempted objections were sustained on appeal by the Commissioner of the General Land Office and by the Department of the Interior, on

the 20th day of June, 1906, and subsequently and on or about the 15th day of May, 1907, the Department of the Interior of the United States recalled its attempted decision of June 20, 1906, and entered an order directing the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, as of the date on which said lieu selections were filed, to wit, the 8th day of February, 1904, and ordered and directed that notice of such order be given to all parties who had made entries upon said lands subsequently to the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, which said notice was duly given as directed.

XVII.

And thereupon your orator further shows unto your Honors:

That subsequently, and as a result of the notice so given, a petition for a review of the departmental decision last referred to was filed on behalf of Archie Johnson, a claimant of part of the said lands embraced by said indemnity lists 178 and 188, which petition set forth the existence of an alleged conspiracy, averred to have been formed for the purpose of acquiring all of the said lands, in the first instance, and that the said lieu selections, so made as aforesaid, were in accordance with, and constituted a part of, said alleged conspiracy, and that the plaintiff herein was not a purchaser in good faith of said land described in paragraph V of this amended complaint, or any part thereof, which petition for review was allowed, upon

the ground that all previous hearings before the Department of the Interior, so had as hereinbefore alleged, were purely ex parte, and were, consequently, not proper proceedings in which to determine the merits of the adverse claims to the lands in question, for the purpose of basing a final decision thereon, and, therefore, an order was made directing that a final hearing should be held before the Register and Receiver of the United States land office at Lakeview, Oregon, for the purpose of determining the respective merits of various claims to the lands embraced within the said school indemnity lists 178 and 188.

XVIII.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 25th day of May, 1908, said hearing so ordered, as aforesaid, was duly and regularly had before the Register and Receiver of the United States land office at Lakeview, Oregon, the plaintiff herein appearing in person and by attorneys, and the defendant and other adverse claimants appearing in person or by attorneys, at which time the said Register and Receiver, after duly hearing the respective parties, attempted to hold that the various homestead and timber and stone entries hereinbefore referred to in paragraph XIII of this amended complaint and particularly the entry of the defendant which was made on the 1st day of September, 1910, should be allowed, which decision was subsequently, and on or about the 13 day of April, 1909, reversed by the Honorable Commissioner of the

General Land Office, who held that the lieu selection referred to in paragraph VII of this amended complaint, together with other selections made in the interest of the plaintiff herein, had been duly and regularly made, and should be allowed to remain intact, upon the records of the United tSates Land Office, as of the date on which they were filed, to wit, February 8, 1904.

XIX.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the ..... day of ....., 19....., an appeal from the decision of the Honorable Commissioner of the General Land Office, hereinbefore referred to in paragraph XVIII of this amended complaint, was taken by certain alleged homestead and timber and stone claimants, including defendant, to the Department of the Interior of the United States, which department, acting through the Honorable Frank Pierce, its First Assistant Secretary, found that the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, were filed simultaneously with the relinquishment and cancellation of said indemnity lists 178 and 188, to wit, on the 8th day of February, 1904, and before the attempted filing of the said alleged homestead and timber and stone entries, so made as alleged in paragraphs VIII and XIII of this amended complaint, and further found that the record then before said department fully showed, and every material

fact supported the conclusion, that the plaintiff herein was a purchaser in good faith, free from fraud of any kind, and that the said alleged homestead and other entries, and particularly the entry of the defendant, were made subsequently to the 8th day of February, 1904, and after the filing of the lieu selection, so made as alleged in paragraph VII of this amended complaint, and that said lieu selection, so made as alleged in paragraph VII of this amended complaint, had been allowed by the Secretary of the Interior, as alleged in paragraphs XIV and XVI of this amended complaint, and had been allowed by the Commissioner of the General Land Office, as alleged in paragraph XV of this amended complaint, and, based upon said findings, held that it was within the competency of the officers of the land department of the United States to allow the said alleged homestead and timber and stone entries to be made after the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, and the allowance of said selections, so made as alleged in paragraphs XIV and XV and XVI of this amended complaint, and further held that said lieu selections, so made and allowed, would be denied in all instances where the local officers of the United States Land Office at Lakeview, Oregon, had attempted to allow homestead and timber and stone entries to be made, a copy of which decision is hereunto attached and marked "Exhibit A," and, by reference, incorporated in and made a part of this amended complaint.

XX.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the ..... day of ..... and in accordance with the ruling of the decision hereinbefore referred to in paragraph XIX of this amended complaint, a patent to the following described land, situated in the county of Klamath and State of Oregon, and particularly described as follows, to wit:

> The northwest quarter of the southeast quarter, and the northeast quarter of the southwest quarter, and the northwest quarter of the southwest quarter, section two, township thirty-seven south, range ten east of the Willamette Meridian,

was issued in the name of John Y. Johnson, the defendant herein, contrary to ,and in violation of, the rights and equities of the plaintiff herein, and that the said patent so issued, as aforesaid, was issued by the officers of the United States government without regard to, and in contravention of, the vested rights of the plaintiff herein, and in accordance with the ruling of the Department of the Interior, as evidenced by the decision referred to in paragraph XIX of this amended complaint.

XXI.

And thereupon your orator further shows unto your Honors:

That this is a suit between citizens of different states, and that the amount in controversy herein ex-

ceeds the amount of three thousand ($3000) dollars, exclusive of interest and costs.

XXII.

And thereupon your orator further shows unto your Honors:

That he has no plain, adequate, or speedy remedy at law, but only in equity.

WHEREFORE, and forasmuch as your orator is remediless in the premises, under and by strict rules of common law, and can only have relief in a court of equity where matters of this nature are recognizable and reviewable, files this, his amended bill of complaint, and prays:

I. That the defendant may be adjudged and decreed to hold said land described in paragraph V in trust for your orator, and to convey the same to your orator, and deliver to your orator any patent or other deeds of the same in his possession, and be restrained and enjoined from hereafter setting up any claim or title to said land, or any part thereof, or in any manner intermeddling therewith, or removing any timber or other product therefrom.

II. That the defendant may be adjudged and decreed to hold any timber or other product by him or his servants or agents removed from said land, or the proceeds or manufactured product from the same, in trust for your orator, and may be decreed to account to your orator for the same, or the value thereof, and to repay to your orator said value, with interest from the date of sale, if the same has been sold by the said defendant.

III. That upon the failure of the defendant to make said conveyance and to deliver to your orator any patent or other deeds of the said land described in paragraph V, within a period of thirty days from the entry of the decree of this court, the said decree be adjudged and decreed to stand as a conveyance in lieu of such patent or other deeds.

IV. And your orator further prays: That your Honors may grant unto your orator a writ of subpoena of the United States issued out of and under the seal of this Honorable Court, directed to the defendant, John Y. Johnson, therein and thereby commanding said defendant, under a certain penalty therein to be named, personally to be and appear before your Honorable Court, then and there to answer, all and singular, (but not under oath, answer under oath being expressly waived), the matters and things aforesaid, and to stand and abide by and sustain such direction and decree as shall be made herein, as to your Honors shall seem equitable and just.

V. And your orator prays for such further relief in the premises as the nature and circumstances of this cause may require and to your Honorable Court may seem reasonable and proper.

And your orator, as in duty bound, will ever pray.

A. D. DANIELS,

By Platt & Platt and Hugh Montgomery, His Solicitors.

Hugh Montgomery,

of Counsel.

[Exhibit "A"]

D. C. M. G. B. G.

DEPARTMENT OF INTERIOR.

Washington, Feb. 17, 1910.

E--900.

Aztec Land & Cattle Company, Lt'd.
E. B. Perrin
Lieu Selectors,
A. D. Daniels,
Claimant of Beneficial Interest,
vs.
Archie Johnson, et al,
Intervenors.
The Commissioner
Of the General Land Office.

Sir:

This is the appeal of Archie Johnson, et al., intervenors, from your office decision of April 13, 1909, sustaining the claim of A. D. Daniels, beneficiary under Lieu Selections, Nos. 15016, 15017 and 18, (Serials 0714, 0715, 0716) for certain described lands in the Lakeview Land District, Oregon. Questions affecting the validity of these selections have been subject of numerous decisions of the Land Department, and a detail statement of such proceedings covering a period of more than eight years, must of necessity be set out

in detail, if the issues now presented may be properly understood.

January 28, 1902, the lands involved were selected by the State of Oregon, per school indemnity lists Nos. 178 and 188 these lists were held for cancellation by your office, because of invalid base, and were finally cancelled in March and August, 1904, upon relinquishments filed on behalf of the state. The date of the filing of these relinquishments is one of the disputed questions in this record: and while not necessarily controlling, it is in view of this case important, and will be considered on its merits in the progress of this paper.

For present statement, it will be enough to say that the local officers and your office have found that it was filed Feb. 10, 1904, whereas it is claimed on behalf of A. D. Daniels, owner of the Beneficial interest in certain Forest Lieu Selections of these same lands, that it was filed Feb. 8, 1904. However this may be, the Forest Lieu Selections in question were filed on said last named date Feb. 8, 1904, but were rejected by the local officers in a letter to one, L. T. Barin, March 4, 1904, for conflict with certain homestead and timber and stone applications for part of the same lands, These Forest Lieu Selections were filed by Barin in the name of Edward B. Perrin, and Aztec Land and Cattle Co. but the said A. D. Daniels was the beneficial owner of the scrip, which was filed in his interests to protect his purchase from the state under its aforesaid Invalid Indemnity Selections.

On appeal, your office affirmed the action of the

Register and Receiver, giving as further reason and justification thereof the fact, that the Lieu Selections were presented at the local land office prior to cancellation of said Indemnity School Selections, and even prior to the filing of the state's relinquishment. Upon appeal, however, from this action of your office, the Department, Oct. 25, 1905, reversed your office decision, stating while the appeal was pending an affidavit had been filed by A. D. Daniels in which he stated that he was the real party in interest and the equitable owner of the lands assigned as bases for the Lieu Selections; that after its selections of the lands as School Indemnity, the State of Oregon had sold them to sundry purchasers, who paid part of the purchase price and assigned the certificates of sale to him, and he was then the owner thereof; that he thereafter became doubtful as to the validity of the State selection, and in order to protect his interests obtained relinquishments from the State and caused them to be filed in the Local Land Office at Lakeview with Lieu Selections; that in so doing he relied upon your office report of Oct. 13, 1904, (1903) to the Secretary of the Interior; which report was transmitted by the Department to the Governor of Oregon Oct. 17, 1904 (1903).

Considering the appeal, the Department held that the case, was controlled by its decision in the California and Oregon Land Company, (33 L. D. 595), that this case was in all essential respects the same as that one, and remanded the case with directions to adjudicate it thereunder. The Lieu Selections having

been returned to the Register and Receiver for allowance in accordance with said decisions, they were again, on Dec. 6, 1905, rejected by the local officers, for the reason that the lands had been withdrawn by telegram of June 25, 1904, for the Klamath River project. This action of the Register and Receiver was reversed by your officer Jan. 23, 1906, and the selections were remanded to be entered of record as of date Feb. 8, 1904, the day on which they were originally presented, if no other objection appeared. Under dates of March 5, and June 11, 1906, the Register submitted full reports to your office upon the said applications; and stated there were objections to the allowance of the same, in that there were various homesteads and timber and stone applications which had been allowed subsequently to the cancellation of the state's list. The Register also referred to the fact that Daniels had caused a contest to be instituted against the State's selection, and questioned his good faith in the matter.

Separate appeals were taken by the Aztec Land and Cattle Company and Perrin from this action of the local officers, and the papers in connection with the application of the Aztec Company were transmitted to the Department by your office, letter of May 9, 1906, for further consideration in connection with the report of the local office.

Upon consideration of the matter thus presented, the Department held in its decision of June 26, 1906, that the facts failed to show that Daniels, was entitled to protection as a Bona Fide purchaser from the

state; that the State's selections were filed Jan. 28, 1902, while the lands were sold on Jan. 21st, preceding, at which they were public lands of the United States, and no one purchasing them could claim to be a Bona Fide purchaser from the State; that as late as Oct. 5, 1903, Daniels was not asserting that he was a purchaser in good faith from the State, but was acting adversely to it and attempting to contest the lists under which he later asked for recognition as a Bona Fide purchaser and for equitable relief; that this position then was inconsistent with the position later assumed: and if had since acquired assignments of the State's certificates of sale, he had done so with full knowledge of the invalidity of the State's claim; that the facts set forth above were fatal to his contention that he was a Bona Fide purchaser, and as such should be permitted to file the State's relinquishment and obtain precedence over others seeking to appropriate the lands under the General land laws; that to conceed to him this privilege under letters Oct. 17 & 13, 1903, mentioned above, would in effect, be to make such persons as from time to time might constitute the State Land Board, agents to dispose of the public lands of the United States, within the State, to such persons as they might favor by means of sales of public land as state land, the subsequent filing of the State's list invalid for want of sufficient base; the filing of the State's relinquishment, and the protection of the purchaser from the state by grace of the Land Department. The Department accordingly held in that decision that the lieu selection should be rejected.

A motion for review of said decision of June 26th, 1906, having been filed by Daniels, Department, on May 15 and 18, 1907, rendered decisions holding that while Daniels, was not, strictly speaking a Bona Fide purchaser from the State, because the Certificates of sale issued by the State antedated the filing of the School Indemnity Selections, and therefore were made at a time when there was no actual claim of the State pending, still Daniels had not purchased the land until the month of April, 1902, nearly three months after the lands had been actually selected by the State, and that having paid a valuable consideration for the lands in an honest belief that a title was being obtained, that was sufficient to constitute a Bona Fide Purchase.

The decision of June 26th, 1906, was therefore recalled, and it was ordered that the Lieu Selection should be reinstated.

In promulgating the decision last mentioned, your office returned the Lieu Selections to the Local Land Office for allowance, and instructed the Register and Receiver to notify all parties who had made entry of said lands subsequently to the cancellation of the State's list to show cause within sixty days why their entries should not be cancelled, because of conflict with said Lieu Selections as a result of which a petition termed, a motion for re-review of Departmental decisions of May 15, and 18, 1907, was filed on behalf of Archie. Johnson who claimed a part of the Lands under a sale made thereof under the Public Land Laws.

This petition or motion charged, in effect, that a conspiracy had been formed for the purpose of acquiring the lands originally by means of the State's selection involved: that the entire proceeding by which title was sought to be acquired was fraudulent, and that the parties thereto should not be allowed to perfect title to the lands, to the injury of those who in good faith had entered the same under the public land laws.

Considering this petition, the Department stated in its decision of August 10th, 1907, that its previous decisions had been ex parte, and that the last decision favorable to Daniels did not prevent your office ordering a hearing, or taking other action with respect to the disposition of the claims of others which might be materially affected by the re-instatement of the claim of Daniels; and the case was accordingly remanded to your office for further consideration, to the end that a full and thorough investigation might be made into the matter, and your office was expressly advised that the previous decisions of the Land Department should in no wise embarass your action in the premises.

A hearing was accordingly ordered; and after due notice to all parties concerned, that the same was had before the local land office, May 25, 1908, Daniels appearing in person and by attorney, and the other parties claiming an interest either in person or by an attorney. The Local Land Office found that the case was not similar in all respects to that of the California and Oregon Land Company cited above; that in

that case there were no intervening rights or equities of other parties, while in the case under consideration the lands had been entered by bona fide settlers or purchasers, to many of whom final certificates had issued and in some instances even Patents had been issued.

The Register and Receiver accordingly recommended that the Homestead and Timber and Stone Entries of the various parties in the case should be allowed to remain in tact. Daniels appealed to your office, whereby your said decision of April 13, 1909, the action of the Local Office was reversed, and it was held that the Lieu Selections should remain in tact.

An appeal on behalf of the Homestead and Timber and Stone claimants brings the case before the Department. Most of the applicants to purchase the lands from the State upon whose supposed initiative these selections were made were not persons in being, but were fictitious persons, usually designated as "Dummies."

But while this is so, there is no evidence in this record showing or tending to show, that Daniels, or any person in privity with him, in fact, was a party to or had any knowledge of the intended fraud; and every material fact in this record supports the conclusion that Daniels bought in good faith, the Certificates of sale issued by the State. He had never heard of these State's Selections until one McHale, a timber land speculator of whom he had no personal acquaintance, but who was known to him by reputation, had reported to him that there was a large body of timber

land for sale, at Klamath, Oregon; and upon McHale's representations, he constituted McHale his agent under powers which amounted to, co-partnership, and McHale went to Klamath Falls to fully investigate these lands and the title thereto. McHale had instructions from Daniels, among other things, to secure the services of an attorney upon the question of title.

He did so. The attorney after an examination of the certificates of sale, reported that the title was good, and McHale's inquiries into the character of the land being satisfactory the results of his investigations was reported to Daniels and the deal was closed, upon the payment by Daniels of $23,901.10 for the certificates, of sale, and the further payment to the State of the unpaid ballance of the purchase price thereon, amounting to $3,033.74. Daniels had no personal acquaintance with any of the parties to the transactions; and so far as it appears from this record, he had no knowledge, information or belief which should have caused him to question the bona fides, of the people with whom he was dealing, or cause him to suspect that there was irregularity in the transaction. Nor was there anything in his connection with subsequent events, in his efforts to acquire title to these lands which may reasonably be said to go to the good faith of his purchase. It appears that rumors were soon thereafter rife with reference to land frauds in Oregon in connection with its school land grant.

The rumors reached Daniels and he promptly investigated them, finding for the first time that his title was questionable, upon the advice of his attorney, he initiated a contest against the State's selections upon which his title rested, hoping thereby to protect his purchase by acquiring an equitable preference right.

As a result of this contest, the state refunded the money which he had paid it and put in the hands of his attorney a relinquishment to the United States of all rights under its selections. Daniels then caused said relinquishments to be filed in the District Land Office, together with the Lieu Selections. There was certainly nothing reprehensible in this proceeding. Moreover, it was taken upon certain suggestions made in your said report of October 13, 1903. This report was responsive to a letter from the Governor of Oregon, September 28, 1903, wherein the inquiry was made of this department as to the means of protecting bona fide purchasers of the school indemnity lands from the State in instances where the State's selections had been cancelled for invalid base. Your offices reported among other things, and this is the same report transmitted to the Governor of Oregon, Oct. 13, 1903, that as to such selections—

while the selection is of record and uncancelled, the land is segregated thereby, and no right can be acquired by the presentation of an applicaiton therefor (29 L. D. 29), but the purchaser holding the State's relinquishment may present it with his application and thereby secure right of entry.

This is also the plain holding of this Department in the
in California and Oregon Land Company, supra, and is precisely the course pursued by Daniels in this case. His contest against the State's selection was to that end. He secured the State's relinquishments and presented them with the aforesaid applications to scrip the land.

It is true the record shows that the relinquishments were not marked, filed, in the local office until Feb. 10, 1904, which was two days after the presentation of the scrip applications.

It is further shown that it was the custom in that office to note the filing of the relinquishments of entries and filings upon public lands on the same day they were received in the office; and a clerk in said office gives it as his opinion that if these relinquishments had been receved on February 8, instead of February 10, the filing would have been noted on the day they were received.

But it is evident from the facts and circumstances surrounding the incident that the scrip applications and the State's relinquishments were, in fact, filed simultaneously.

The filing was by mail, and the letter of transmittal was written by Daniel's attorney, the said L. T. Barrin.

The letter recites that it contains the relinquishments in question, and it was received at the local land office February 8. Moreover, the action of the local officers at the time in rejecting the proffered

scrip applications, is put upon the ground that part of the lands were covered by pending homestead and timber and stone applications, whereas if the State had not then relinquished its school indemnity selections, the local officers would surely have assigned this as the reason for rejection of said applications, because this reason would have applied to all of the lands involved, instead of only a small portion of them, as was the case with the reason assigned.

It is worthy of too, that there has not been found any correspondence or record which would indicate that if the said Barin, had left these relinquishments out of his letter by inadvertence, they were ever afterwards transmitted to the local land office, and no correspondence or record of correspondence showing that if he had been guilty of such inadvertence he was ever advised thereof by the local officers.

I conclude therefore, on this branch of the case that the relinquishments in question and the scrip applications were filed at the same time, as was suggested they might be, in your office report of September 28th, 1903, above quoted.

Under existing regulations, it was the duty of the Register and Receiver to forward these applications, and these relinquishments without action for the consideration and disposition of your office. This however, it has been seen, was not done.

The scrip applications were rejected, and the history of the case, hereinbefore set out, shows that these applications were kept alive by successive appeals,

and that the case was twice remanded to the local officers, with directions to allow the applications, but various reasons were assigned for the neglect or failure of the local officers to obey these instructions.

It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the Secretary had been carried out, it would have been done before the case became complicated by the counter-equitable considerations arising upon the unfortunate allowance of the Homestead and Timber and Stone entries for most of these lands. It is thought however, that in instances where the land department has permitted these entries and filings to go of record, where they have become closed transactions, the Department would not be justified in cancelling such entries and filing, for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition.

See Hoyt vs. Weyerhauser et al). (161 F. E. D., Rep., 324).

It appears however, from your office reports of Dec. 16, 1909, that there are approximately 107 quarter Sections of land involved in this case. Of these, twenty-eight are involved in homestead entries, four

in cash entries and homestead entries, twenty-four in cash entries, twenty-five in Timber and Stone sworn statements, twelve are free and unappropriated, eight of them do not appear to be covered by the Lieu Selections in question, and seven of them have been patented.

In view of what has been said, the claim of Daniels must be denied as to all of them except those covered by Timber and Stone sworn statements only, and those that are unappropriated, amounting to what seems to be, from your office reports, approximately thirty-seven quarter sections in all.

As to these lands, the Timber and Stone applicants have not put themselves in privity with the United States, and the Land Department has not entered in to such Contract with them as to preclude other disposition of the lands.

See Campbell vs. Weyerhauser et al (161 Fed. Rep., 332).

This being true, and believing that the equities of Daniels should be protected to the fullest extent consistent with equitable administration, I have to direct that the Scrip applications be allowed as to all tracts which have not been otherwise disposed of, and rejected as to such as now appear to be covered by Homestead and cash entries.

The decision appeal from is modified. The papers are herewith returned.

Very respectfully,

FRANK PIERCE,

First Assistant Secretary.

Enclosures.

[Endorsed]: Amended Bill in Equity. Filed May 17, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 1 day of July, 1912, there was duly filed in said Court, a Demurrer, in words and figures as follows, to wit:

[Demurrer to Amended Bill of Complaint.]

In the District Court of the United States in and for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JOHN Y. JOHNSON,

Defendant.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF OREGON:

Demurrer of the above named defendant, John Y. Johnson, to the amended bill of complaint of the above named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in said amended bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs to said amended bill.

And for cause of demurrer shows:

I.

That it appears by the plaintiff's own showing by

the said amended bill that he is not entitled to the relief prayed by the said amended bill against this defendant.

II.

That the said amended bill of complaint of the plaintiff is wholly without equity.

Wherefore, and for divers other good causes of demurrer appearing on said amended bill, this defendant demurs thereto, and he prays the judgment of this honorable court whether he shall be compelled to make further or any answer to the said amended bill; and he humbly prays to be hence dismissed with his reasonable costs in his behalf sustained.

ARTHUR I. MOULTON,
H. M. MANNING,
Solicitors for Defendant.

STATE OF OREGON,
County of Multnomah—ss.

I, Arthur I. Moulton, being first duly sworn, on oath say: That I am one of the solicitors for the defendant, John Y. Johnson, in the within entitled cause; that the within and foregoing demurrer is, in my opinion, well founded in point of law; that the said demurrer is not interposed for the purpose of delay.

ARTHUR I. MOULTON.

Subscribed and sworn to before me this 28th day of May, 1912.

[Seal.] M. E. SNEDECOR,
Notary Public for Oregon.

[Endorsed]: Demurrer. Filed July 1, 1912.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 15 day of July, 1912, the same being the 12 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to wit:

[Decree.]

In the District Court of the State of Oregon in and for the District of Oregon.

A. D. DANIELS,
Plaintiff,

vs

JOHN Y. JOHNSON,
Defendant.

This cause having come on regularly to be heard by the court upon the demurrer of the above named defendant to the amended bill of complaint of the above named plaintiff, and the plaintiff having appeared by his attorneys, Messrs. Platt & Platt and Hugh Montgomery, and the defendant having appeared by Arthur I. Moulton and H. W. Manning, his attorneys, and the court having heard the arguments of counsel for the respective parties, and having taken the said cause under advisement, and fully considered the same, and being now fully advised in the premises, and it appearing to the court that the said demurrer is well taken and should be in all re-

spects sustained, and that said bill of complaint is without equity, and should be dismissed.

It is therefore ordered, considered, adjudged and decreed by the court that the said demurrer be, and the same is hereby, in all respects sustained, and that said amended bill of complaint be, and the same is hereby, dismissed, and that defendant have and recover of and from said plaintiff his costs and disbursements herein, taxed at $.....

Dated this 15th day of July, 1912.

R. S. BEAN,
Judge.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition for Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JOHN Y. JOHNSON,

Defendant.

The above named plaintiff conceiving himself aggrieved by the order and decree made and entered in the above entitled cause on the 15th day of July, 1912, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he

prays that this appeal may be allowed, and that a transcript of the record, papers, and proceedings and all things concerning the same, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon his filing a bond for the payment of all damages and costs if he fails to prosecute the said appeal to effect which bond shall act as a supersedeas bond.

A. D. DANIELS,

By Platt & Platt and Hugh Montgomery, Solicitors for Plaintiff.

Hugh Montgomery,

of Counsel.

[Endorsed]: Petition for Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to-wit, on the 29 day of August 1912 there was duly filed in said Court Assignments of Error in words and figures as follows, to-wit:

[Assignments of Error.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

John Y. JOHNSON,

Defendant.

Now on this 29th day of August, 1912, comes the above named plaintiff A. D. Daniels, appearing by

Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record and says that in the record and proceedings of the above entitled Court in the above entitled cause and in the final order and decree entered therein on the 15th day of July, 1912, there is manifest error and that said order and decree is erroneous and against the just rights of said plaintiff and for error the said plaintiff assigns the following:

I.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff, on the 8th day of April, 1904, made a valid forest lieu selection of the lands described in paragraph V of plaintiff's amended bill filed in said cause under and in accordance with the provisions of the Act of Congress of June 4th, 1897, set forth in paragraph VI of plaintiff's amended bill of complaint.

II.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the forest lieu selection of the plaintiff made upon the lands described in paragraph V of his amended bill of complaint was prior in time to and initiated a right and interest superior to the claim of any person or persons whomsoever and particularly the defendant.

III.

Because the above entitled court erred in sustaining

the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the attempted homestead entry of the defendant was subsequent in time and inferior in right to the forest lieu selection of the plaintiff.

IV.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the forest lieu selections of the plaintiff had been approved by the proper officers of the United States government which approval gave the plaintiff a vested interest in the land so selected.

V.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the alleged homestead entry of the defendant was made in contravention of the vested rights of the plaintiff herein.

VI.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the complainant was equitably entitled to be protected in the forest lieu selections which he had made on the lands described in paragraph V of his amended bill of complaint as against the claims of the defendant or any person or persons whomsoever.

VII.

Because the above entitled court erred in sustain-

ing the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff was equitably entitled to have the defendant declared a trustee for the plaintiff of the lands described in paragraph V of his amended bill of complaint.

VIII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that the bill of complaint stated a good cause of action to which the defendant should be required to file his answer or plea.

IX.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint and decreeing that said amended bill of complaint be dismissed and allowing costs to the defendant.

WHEREFORE, the plaintiff and appellant prays that the decree of said court be reversed and such directions be given that full force and efficacy may enure to the plaintiff by reason of the cause of suit set up in his amended bill of complaint filed in said cause and that a decree be entered in accordance with the prayer of plaintiff's amended Bill of Complaint.

PLATT & PLATT and HUGH MONTGOMERY,
Solicitors for Plaintiff.

Hugh Montgomery,
of Counsel.

[Endorsed]: Assignment of Errors. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, an Order Allowing Appeal, in words and figures as follows, to wit:

[Order Allowing Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JOHN Y. JOHNSON,

Defendant.

This day came A. D. Daniels, plaintiff, appearing by Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record and presented his petition for an appeal and an assignment of errors accompanying the same which petition, upon consideration of the court, is hereby, allowed, and the court allows an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon the filing of a bond in the sum of $500 with good and sufficient surety to be approved by the court; and

It is further ordered that said bond shall act as a supersedeas bond, and

It is further ordered that a certified transcript of the record, and all proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals.

R. S. BEAN,

Judge.

Dated this 29th day of August, 1912.

[Endorsed]: Order Allowing Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plantiff,

vs.

JOHN Y. JOHNSON,

Defendant.

KNOW ALL MEN BY THESE PRESENTS:

That we, A. D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto John Y. Johnson in the full and just sum of five hundred ($500) dollars to be paid to the said John Y. Johnson, his executors, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents:

Sealed wth our seals this 29th day of August, A. D. 1912.

WHEREAS, lately at the District Court of the United States for the District of Oregon, in a suit

pending in said court between A. D. Daniels, plaintiff, and John Y. Johnson, defendant, a decree was rendered against said plaintiff, A. D. Daniels, and said A. D. Daniels having petitioned an appeal and filed a copy thereof in the Clerk's office in said court to reverse the same in the aforesaid suit, and a citation directed to the said John Y. Johnson, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be holden in the City of San Francisco in said Circuit, on the 28th day of September, A. D., 1912, having been served on said defendant;

NOW, the condition of this obligation is such, that if the said A. D. Daniels shall prosecute his appeal to effect, and answer all damages and costs if he shall fail, to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

A. D. DANIELS,
By Platt & Platt, His Solicitors of Record.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

[Seal.] By HARRISON G. PLATT,
Attorney in Fact.
By W. J. CLEMENS,
Agent.

Examined and approved this 29th day of August, 1912.

R. S. BEAN,
District Judge.

[Endorsed]: Bond on Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of August, 1912, there was duly filed in said Court, a Citation on Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

A. D. DANIELS,

Appellant,

vs.

JOHN Y. JOHNSON,

Appellee.

UNITED STATES OF AMERICA,
Ninth Judicial Circuit—ss.

TO JOHN Y. JOHNSON, GREETING:

WHEREAS, A. D. Daniels, appellant in the above entitled suit has lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from a decree lately rendered in the District Court of the United States for the District of Oregon, made in favor of you, the said John Y. Johnson, and has filed the security required by law; you are therefore hereby cited to appear before the said United States Circuit Court of Appeals at the City of San Francisco, State of California, on the 28th day of September, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the City of Portland, in the Ninth Judicial Circuit this 29th day of August, in the year of our Lord, one thousand nine hundred twelve.

R. S. BEAN,
Judge of the District Court of the United States.

UNITED STATES OF AMERICA,
District of Oregon—ss.

Due service of the within Citation to Appellee, by certified copy thereof as required by law, is hereby acknowledged at Portland, Oregon, this 30th day of August, 1912.

ARTHUR I. MOULTON,
of Attorneys for Appellee.

[Endorsed]: Citation to Appellee. Filed Aug. 30, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Saturday, the 28 day of September, 1912, the same being the 77 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

JOHN Y. JOHNSON,

No. 5514.

September 28, 1912.

Now, at this day, for good cause shown, it is ORDERED that the plaintiff's time for filing and docketing the record on appeal in this cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same is hereby enlarged and extended ninety (90) days from this date.

R. S. BEAN,

Judge.

No. 2225

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

A. D. DANIELS,

Appellant,

vs.

JOHN Y. JOHNSON,

Appellee.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

At a stated term, to wit, the October Term A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2225.

A. D. DANIELS,

Appellant,

vs.

JOHN Y. JOHNSON,

Appellee.

Order of Submission in U. S. Circuit Court of Appeals.

ORDERED, appeal in the above-entitled cause argued by Mr. Hugh Montgomery, counsel for the appellant, and by Mr. Arthur I. Moulton, counsel for the appellee, and submitted to the Court for consideration and decision.

In the United States Circuit Court of Appeals for the Ninth Circuit.

A. D. DANIELS,

Appellant,

vs.

JESSIE E. WAGNER,

Appellee.

Opinion U. S. Circuit Court of Appeals.

PLATT & PLATT and HUGH MONTGOMERY, for the Appellant.

ANGELL & FISHER, F. H. MILLS, ARTHUR I. MOULTON and P. A. LAFFERTY, for the Appellees.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

The decision in this case involves the merits of sixteen suits pending in this court on appeal, in all of which A. D. Daniels, the appellant, was the complainant in the court below. The object of each suit was to obtain a decree declaring the defendants therein holders of the legal title to the land described in each case as trustees for said complainant. Demurrers to the bills for want of equity were sustained, and from the decrees thereupon rendered dismissing the bills, the appeals are taken.

The allegations in the bills are substantially the same. In the case which is above-entitled the allegations are in substance the following: That on and prior to April 12, 1902, Edward B. Perrin and the

Aztec Land & Cattle Company, Ltd., a corporation, each owned certain lands in fee simple in the Territory of Arizona; that on that date those lands were included within the limits of the San Francisco Mountains Forest Reserves, and that thereafter, on February 2, 1904, under the provisions of the Act of Congress of June 4, 1897, the said land owners relinquished and conveyed to the United States their interest in said lands, and on February 8, 1904, they made lieu selections of certain public lands in Klamath County, Oregon, for the benefit of the complainant; that the selections were perfected by presenting the recorded deed, together with a full, true and correct abstract of title showing that the selectors were the owners in fee simple of the lands relinquished; that on or about June 28, 1902, the State of Oregon had filed upon the lands so selected certain instruments purporting to be school indemnity lists, and before the approval of the lists, had sold the lands to the complainant, but that thereafter, owing to the invalid character of the base lands tendered in said lists, the lists were held for cancellation, and in March and August, 1904, were finally cancelled and relinquishments of said lists were filed on behalf of the State of Oregon; that prior to such cancellation, the State of Oregon acting through the officers of the State Land Board, sold to various *bona fide* purchasers for value, the timber lands upon which the said school indemnity lists had been filed, and that the appellant in good faith purchased the said lands from the State of Oregon; that thereafter, discovering that the State had no right, title or interest in

said lands so conveyed, the forest lieu selections already referred to were made for the purpose of protecting complainant's interest in said lands; that at the time of making their selections, the selectors filed with their selections relinquishments from the State of Oregon of any rights which it might have acquired by virtue of the school indemnity lists so filed by it; that after making such lieu selections and filing such relinquishments, the officers of the Land Office at Lakeview, Oregon, having allowed other entries to be made upon the lands so selected by homestead, timber and stone applications for the lands, rejected the selections so made by the complainant's predecessors in interest; that upon appeal to the Commissioner of the General Land Office, the action of the Register and Receiver at Lakeview was affirmed; that the Commissioner advanced as a further reason for the rejection that at the time when the lieu selections were presented at the local land office, the State indemnity school selections had not been cancelled or relinquished; that the State of Oregon executed relinquishments and the same were filed in the Land Office, bearing the file-mark of February 10, 1904; that the relinquishments were forwarded to the Commissioner of the General Land Office, and on March 7, 1904, he advised the Register and Receiver at Lakeview that the relinquishments had been received, and directed them to make due notation that the lists were cancelled, "leaving the lands open to entry by the first legal applicants"; that thereafter the appellee made application for the land at the local land office, and his filing was accepted; that thereafter various

proceedings were had in the Land Department, concerning the land so entered, and on August 10, 1907, the Secretary of the Interior instructed the Commissioner to order a hearing, that a full investigation might be had of the whole matter; that upon the hearing the local land office found that the lands had been entered by *bona fide* settlers or purchasers, to many of whom certificates, and in some instances, patents had issued; that the Register and Receiver accordingly recommended that such entries be allowed to remain, and the Secretary of the Interior finally so decided on February 17, 1910, holding that the greater equities were with the Homestead and Stone and Timber entrymen, and that in the discretion of the Secretary, such entries might be protected against the right of the scrip applications, and said: "It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons, and having done so, Daniels will not now be heard to question the correctness of that disposition."

GILBERT, Circuit Judge, after stating the case:

The appellant contends that by virtue of his offer to select the lands in question, and the tender in exchange therefor of a deed and abstract of title to the lands offered for surrender, he thereby became the equitable owner of the lands so sought to be selected, notwithstanding that his selection was rejected by the officers of the local land office, and that their rejection was affirmed by the Secretary of the Interior,

and that the patent having issued to the appellees, when in equity and good conscience, and according to law, it should have gone to the appellant, the Court should convert the holder of the legal title into a trustee for the appellant, and compel conveyance of the legal title to him.

In considering, in the light of the adjudications, the question here presented, it is essential to bear in mind the distinction between the right acquired by a Railroad Company, under a congressional grant of lands to aid the construction of a railroad, to select within the indemnity limits lands in lieu of those which are lost in the place limits, and the right of a lieu land selector under the Act of June 4, 1897. The former is a substantial right in the lands lying in the indemnity limits, given in consideration of the construction of a railroad, and is confined to specific lands within certain boundaries which are defined in the grant. It is a vested right, of which the grantee could not be deprived, by an Act of Congress or by other authority. In Weyerhaeuser vs. Hoyt, 219 U. S. 387, the Court declared that it was the intention of Congress in making such a grant, "to confer a substantial right to land within the indemnity limits in lieu of land lost within the place limits." The right of selection of lieu land given under the Act of June 4, 1897, however, is in the first instance but an offer by the Government to exchange lands. It is based upon no valuable consideration actually received. It attaches to no specific lands, nor to lands within any defined limits. It does not attach upon the mere presentation of the requisite papers. It at-

taches only when the authorized officers of the Government accept the offer to exchange. Nor is it true that the filing of the lieu selection papers and the acceptance of the same by the local Land Office segregates the land upon which the filing is made so as to cut off intervening and subsequent rights as against the lieu selectors. In Roughton vs. Knight, 219 U. S. 537–547, in construing the Act of June 4, 1897, the Court said: "Manifestly there must be an acceptance of the relinquishment by someone authorized to decide upon its sufficiency, and an assent to the particular selection made in lieu." In Cosmos Exploration Co. vs. Gray Eagle Oil Co., 190 U. S. 310, lieu land had been selected under the Act of June 4, 1897. The selector complied with the provisions of the Act. His selection was received and accepted, and entered on the records of the local land office. At that time there was no adverse claim. Before the issuance of a patent, the selector's grantee brought a suit against the defendants, who had entered the land as a mineral claim, he claiming that his grantor had become vested with the complete equitable title to the land so selected, and had become entitled to receive a patent. The Court held that it had no jurisdiction prior to the issuance of the patent, to determine who was entitled to receive it, and that under the Act of June 4, 1897, the officers of the local land office had no authority to decide whether the selector had complied with the provisions of the Act, that authority being vested in the Commissioner of the General Land Office. The Court said: "But even the complete equitable title asserted by a complainant must,

as it would seem, be based upon the alleged right of the local land officers to accept the deed and approve the selection, even though such approval may be thereafter the subject of a review in the nature of an appeal from the action of the local officers. There must be a decision made somewhere regarding the rights asserted by the selector of land under the Act before a complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the statute, and the selector cannot decide the question for himself. We do not see how it can be successfully maintained that without any decision by any official representing the Government, and by merely filing the deed relinquishing to the Government a tract of forest reserve land, and assuming to select a similar area of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land." It is urged that this language of the Court is *dictum*, but we do not so regard it. It contains the reasoning of the Court in determining the nature of the rights of the complainant in that case. But if, indeed, it is true that the expression of such views was unnecessary to the determination of the case which was before the Court, the language used sets forth the mature and unanimous judgment of the members of that court on the question of law which is involved in the case at bar, and we deem it controlling in the decision of the present case.

Nor do we find ground to sustain the appellant's contention that the views of the Court so expressed

in the Cosmos Exploration Company case have been modified by the decision in Weyerhaeuser vs. Hoyt, 219 U. S. 380. That was a case which involved the right of a railroad company to select lands within the indemnity limits of its grant. The Court held that selections of lieu lands filed with the Secretary of the Interior excluded the right of others to appropriate the lands embraced therein pending action by the Secretary, and that the railroad company's rights to such lieu lands so selected were superior to those of a purchaser under the Timber and Stone Act who filed pending final decision by the Secretary, and that the final decision by the Secretary related back to the date of the original selections. Prior to that time, the Court had said, in New Orleans Pacific Ry. Co. vs. Parker, 143 U. S. 57: "As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected by the grantee and approved by the Secretary of the Interior." The same was held in Humbird vs. Avery, 195 U. S. 507. In Wisconsin Central Ry. Co. vs. Price County, 133 U. S. 496, 512, the Court said: "Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title"; and in Sjoli vs. Dreschel, 199 U. S. 565, the Court held it to be established doctrine "that no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior; that up to the time such approval is given, lands within indem-

nity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and, That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road." In the Weyerhaeuser case, the Court distinguished the Sjoli case by saying that it belonged to a class of cases in which there was no question of right by relation involved, and that the general language which we have quoted from the opinion was to be considered in view of the questions which were presented in that case, and that to apply it in the Weyerhaeuser case would be in effect to destroy the indemnity provisions of the Granting Act. No reference was made to the decision in the Cosmos Exploration Company case, and this was evidently for the reason that the language of the Court in that case was deemed to be applicable solely to the right of selection granted by the Act of June 4, 1897, and that the Court recognized and intended to reaffirm the vital distinction which it had found between such rights and the rights of a selector of indemnity lands under a grant to a railway company in aid of the construction of its road. Stalker vs. Oregon Short Line, 225 U. S. 142, is in line with Weyerhaeuser vs. Hoyt and so is Svor vs. Morris, 227 U. S. 524. We consider the decision in the Cosmos Exploration Company case authority for sustaining the decree of the

court below. But there is additional ground for sustaining it in the fact that, at the time when the appellant's selection was initiated on February 8, 1904, the lands involved herein appeared upon the records of the local land office as selected by the State of Oregon by certain school indemnity lists, and that those lists were not relinquished by the state until February 10, 1904. This sufficiently appears from the decision of the Secretary of the Interior, which is made an exhibit to the bill and is controlling in so far as it varies from the allegations of the bill. Greenameyer vs. Coate, 212 U. S. 434, 443.

The decree in each of the sixteen suits, Nos. 2212–2227, is affirmed.

[Endorsed]: Filed May 5, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2225.

A. D. DANIELS,

Appellant,

vs.

JOHN Y. JOHNSON,

Appellee.

Decree, U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the District Court of the United

States for the District of Oregon, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered May 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Petition for Allowance of Appeal to Supreme Court of the United States.

PETITION FOR APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

The above-mentioned appellant, A. D. Daniels, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a decree has therein been rendered, on the fifth day of May, A. D. 1913, affirming the decree of the District Court of the United States for the District of Oregon, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs; that this cause is one

involving the construction and application of a statute of the United States, to wit, Act of June 4, 1897, 30 Statutes at Large, 36 (U. S. Comp. Stats. 1901, p. 1541), and in which the decree of the United States Circuit Court of Appeals for the Ninth Circuit is not final, and is a proper cause to be appealed to the Supreme Court of the United States.

The above-named appellant, conceiving himself aggrieved by the decree made and entered in the above-entitled court and cause on the fifth day of May, 1913, does hereby appeal from said decree to the United States Supreme Court, for the reasons specified in the assignment of errors, which is filed herewith.

WHEREFORE, the said appellant prays that an appeal be allowed him in the above-entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors, herewith filed by the said appellant, may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

PLATT & PLATT,
Solicitors for Appellant.

[Endorsed]: Filed Jun. 2, 1913. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Title of Court and Cause.]

Assignment of Errors on Appeal to Supreme Court of the United States.

COMES NOW the appellant, A. D. Daniels, by Platt & Platt, his solicitors, and says that in the record and proceedings herein there is manifest error, and assigns error thereto as follows:

The United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the decree of the United States District Court for the District of Oregon sustaining the demurrer of appellee to appellant's amended bill of complaint and dismissing appellant's amended bill of complaint:

First. Because the demurrer to appellant's amended bill of complaint admits that on the 8th day of February, 1904, the appellant made a valid forest lieu selection of the land, described in paragraph V of appellant's amended bill filed in said cause, under and in accordance with the provision of the Act of Congress of June 4, 1897, set forth in paragraph VI of appellant's amended bill of complaint.

Second. Because the demurrer to appellant's amended bill of complaint admits that the forest lieu selection of appellant, made upon the lands described in paragraph V of his amended bill of complaint, was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly to that of the appellee.

Third. Because the demurrer to appellant's amended bill of complaint admits that the attempted

homestead entry of the appellee was subsequent in time and inferior in right to the forest lieu selection of appellant.

Fourth. Because the demurrer to appellant's amended bill of complaint admits that the forest lieu selections of appellant had been approved by the proper officers of the United States Government, which approval gave appellant a vested interest in the land so selected.

Fifth. Because the demurrer to appellant's amended bill of complaint admits that the alleged homestead entry of the appellee was made in contravention of the vested rights of the appellant herein to the land described in paragraph V of appellant's amended bill of complaint.

Sixth. Because the demurrer to appellant's amended bill of complaint admits that the appellant was equitably entitled to be protected in the forest lieu selection which he had made on the lands described in paragraph V of his amended bill of complaint as against the claims of the appellee, or any person or persons whatsoever.

Seventh. Because the demurrer to appellant's amended bill of complaint admits that the appellant was equitably entitled to have the appellee declared a trustee, for the appellant, of the lands described in paragraph V of appellant's amended bill of complaint.

Eighth. Because the demurrer to appellant's amended bill of complaint admits that the Oregon school indemnity lists, covering the lands described in paragraph V of appellant's amended bill of com-

plaint, were relinquished simultaneously with the filing of the forest lieu selections by appellant.

Ninth. Because the demurrer to appellant's amended bill of complaint admits that the relinquishments of the Oregon school indemnity lists were filed on February 8, 1904.

Tenth. Because the appellant's amended bill of complaint stated a good cause of suit to which the appellee should have been required to file his answer or plea.

Eleventh. Because the decree of said District Court should have been reversed and the demurrer to appellant's amended bill of complaint overruled.

WHEREFORE, the appellant prays that the decree of the United States Circuit Court of Appeals for the Ninth Circuit be reversed, and such directions be given that force and efficacy may inure to the appellant by reason of the cause of suit set up in his amended bill of complaint filed in said cause, and that a decree be entered in accordance with the prayer of appellant's amended bill of complaint.

PLATT & PLATT,
Solicitors for Appellant.

[Endorsed]: Filed Jun. 2, 1913. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Title of Court and Cause.]

Order Allowing Appeal to Supreme Court U. S. and Fixing Amount of Bond.

IT IS HEREBY ORDERED, that the appeal in the above-entitled case to the Supreme Court of the

United States be, and the same is hereby, allowed as prayed.

AND IT IS FURTHER ORDERED that the amount of the appeal and supersedeas bond be, and the same hereby is, fixed at $500.00.

Dated this 3d day of June, 1913.

WM. B. GILBERT,
United States Circuit Judge, Ninth Circuit.

[Endorsed]: Filed Jun. 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Bond on Appeal to Supreme Court U. S.

KNOW ALL MEN BY THESE PRESENTS, that we, A. D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto John Y. Johnson, in the full and just sum of Five Hundred Dollars ($500), lawful money of the United States of America, to be paid to the said John Y. Johnson, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals this 3d day of June, 1913.

WHEREAS, the appellant in the above-entitled suit is prosecuting an appeal to the United States Supreme Court to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Ninth Circuit on the 5th day of May, 1913;

NOW, THEREFORE, the condition of this obligation is such, that if the said appellant shall prosecute said appeal to effect, and answer all damages and costs if he fails to make said appeal good, then this obligation shall be void; otherwise to remain in full force and effect.

A. D. DANIELS. [Seal]
By PLATT & PLATT,
His Solicitors of Record.
FIDELITY & DEPOSIT COMPANY OF MARYLAND. [Seal]
By ROBERT T. PLATT,
Attorney in Fact.
CHESTER W. HANSEN,
Agent.

Examined and approved this 3d day of June, 1913.
WM. B. GILBERT,
Circuit Judge for the Ninth Circuit.

[Endorsed]: Filed Jun. 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Praecipe for Record on Appeal to Supreme Court of the United States.

To the Clerk of the said Court:

Sir: Please issue a certified Transcript of the Record on appeal to the Supreme Court of the United States in the above-entitled cause, consisting of the following:

1. Copy of Printed Transcript of Record on which case was heard in the Circuit Court of Appeals, to

which will be added a Copy of the following entitled papers that were filed, and of the Proceedings that were had in said Circuit Court of Appeals, viz.:

2. Order of Submission;
3. Opinion;
4. Decree;
5. Petition for Appeal to Supreme Court U. S.; and Order thereon;
6. Bond on Appeal to Supreme Court U. S.;
7. Assignment of Errors;
8. Praecipe for Certified Transcript of Record on Appeal to Supreme Court U. S.;
9. Certificate of Clerk U. S. C. C. A. to Transcript of Record on Appeal to Supreme Court U. S., and
10. Original Citation on Appeal to Supreme Court U. S.

PLATT & PLATT,
Solicitors for Appellant.

United States of America,
Ninth Judicial Circuit,—ss.

Due service of the within Praecipe for Transcript on appeal to Supreme Court U. S. is hereby acknowledged, and certified copy thereof received, at Portland, Oregon, this 7th day of June, 1913.

ARTHUR I. MOULTON,
Of Solicitors for Appellee.

[Endorsed]: Filed Jun. 10, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2225.

A. D. DANIELS,

Appellant,

vs.

JOHN Y. JOHNSON,

Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record on Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-nine (69) pages, numbered from and including one (1) to and including sixty-nine (69), to be a full, true and correct copy of the complete record in the above-entitled cause, prepared pursuant to praecipe therefor filed by counsel for the appellant, including all proceedings had therein, and including the Opinion and the Assignment of Errors filed therein, as the same remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record in said cause on Appeal to the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twentieth day of June, A. D. 1913.

[Seal] F. D. MONCKTON,

Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2225.

A. D. DANIELS,

Appellant,

vs.

JOHN Y. JOHNSON,

Appellee.

Citation on Appeal to Supreme Court U. S.

United States of America,
Ninth Circuit,—ss.

To John Y. Johnson, Greetings:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, sixty (60) days after the date of this citation, pursuant to an appeal filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein A. D. Daniels is appellant and you are appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable W. B. GILBERT, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 6th day of June, A. D. 1913.

WM. B. GILBERT,
Circuit Judge.

United States of America,
Ninth Judicial Circuit,—ss.

Due service of the within Citation to appellee is hereby acknowledged, and certified copy thereof received, at Portland, Oregon, this 7th day of June, 1913.

ARTHUR I. MOULTON,
Of Solicitors for Appellee.

[Endorsed]: No. 2225. In the United States Circuit Court of Appeals for the Ninth Circuit. A. D. Daniels, Appellant, vs. John Y. Johnson, Appellee. Citation. Filed Jun. 10, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed on Cover.]

File No. 23,827.

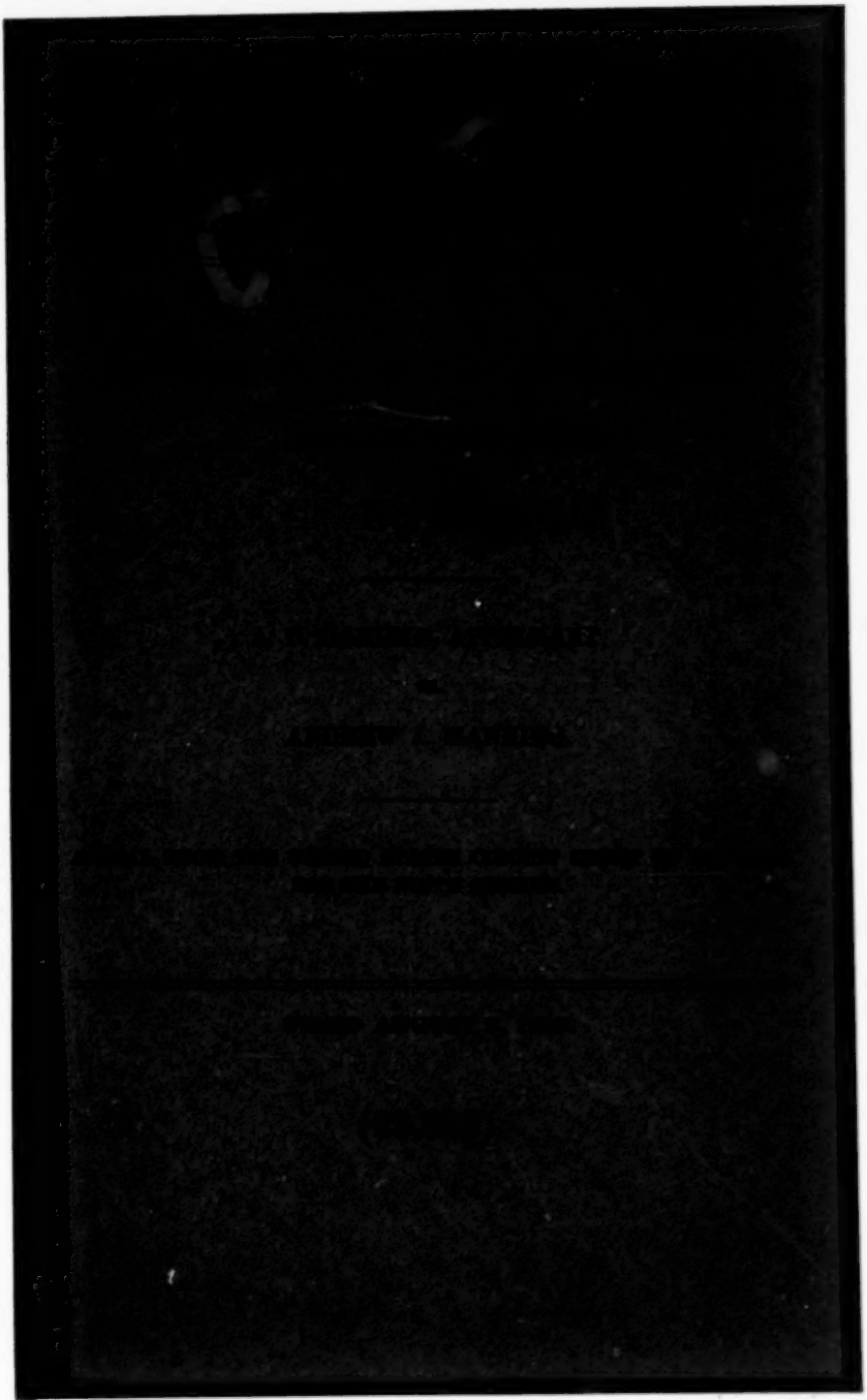
U. S. Circuit Court Appeals, 9th Circuit.

Term No. 676.

A. D. DANIELS, Appellant,
vs.
JOHN Y. JOHNSON.

Filed August 2d, 1913.

File No. 23,827.



(23,828)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 677.

A. D. DANIELS, APPELLANT,

vs.

ANDREW J. MANNING.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 25, 1913.

No. 2226

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

ANDREW J. MANNING,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon

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TRANSCRIPT OF RECORD.

LODGED
JAN - 2 1913
F. D. MONCKTON,
CLERK.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

A. D. DANIELS,

Appellant,

vs.

ANDREW J. MANNING,

Appellee.

Names and Addresses of Attorneys Upon This Appeal:

For the Appellant:

PLATT & PLATT and HUGH MONTGOMERY,
Board of Trade Bldg., Portland, Oregon

For the Appellee:

ARTHUR I. MOULTON and H. M. MANNING,
Fenton Bldg., Portland, Oregon

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In the District Court of the United States for the District of Oregon.

Be it Remembered, That on the 17 day of May, 1912, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Bill of Complaint, in words and figures as follows, to wit:

[Amended Bill of Complaint.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

ANDREW, J. MANNING,

Defendant.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF OREGON:

A. D. Daniels, a citizen and inhabitant of the state of Wisconsin, residing at Rhinelander in said state, with leave of court first had and obtained, brings this, his amended bill of complaint, against Andrew J. Manning, a resident and inhabitant of the state of Oregon, residing at Klamath Falls in said state.

And thereupon your orator complains and says:

I.

That at all times herein mentioned plaintiff was and is a resident and inhabitant of the state of Wisconsin, residing at Rhinelander in said state.

II.

And thereupon your orator further shows unto your Honors:

That at all times herein mentioned defendant, Andrew J. Manning, was and is a resident and inhabitant of the State of Oregon, residing at Klamath Falls in said state.

III.

And thereupon your orator further shows unto your Honors:

That on the 12th day of April, 1902, and immediately prior thereto, one Edwin B. Perrin, was the owner in fee simple, free of any lien or incumbrances, of that certain property located in the Territory of Arizona, and particularly described as follows, to wit:

> The south half of section five, township twenty-two north, range one east; the south half of section three, township twenty-two north, range two east; the south half of section thirty-five, township twenty-two north, range three east; lots one and two, section one, township twenty-three north, range three east; lot two of section one; lot three of section five, and the north half of the northeast quarter of section twenty-one, township twenty-three north, range four east, G. & S. R. M.,

and was the owner in fee simple of said property described in paragraph III of this amended complaint, up until the 2nd day of February, 1904.

IV.

And thereupon your orator further shows unto your Honors:

That on or about the 12th day of April, 1902, the said described lands, mentioned in paragraph III of this amended bill of complaint, were included within the limits of the San Francisco Mountains Forest Reserves, pursuant to a proclamation of the President of the United States made on or about the 12th day of April, 1902, which said lands were then, and still are, non-mineral lands.

V.

And thereupon your orator further shows unto your Honors:

That on or about the 8th day of February, 1904, that certain property situated within the District of Oregon, located in the County of Klamath in the State of Oregon, and particularly described as follows, to wit:

> Lot four, section two, township thirty-seven south, range ten east of the Willamette Meridian,

was surveyed, unappropriated, and vacant public land of the United States, returned and characterized upon the official records of the United States as non-mineral land, free and open to entry and settlement under and in accordance with the laws of the United States governing the acquisition of public lands.

VI.

And thereupon your orator further shows unto your Honors:

That on or about the 4th day of June, 1897, the Congress of the United States passed an act entitled: "An act making appropriation for sundry civil expenses of the government, for the fiscal year ending June 30, 1898, and for other purposes:" which act provides, among other things, as follows, to wit:

> "That in cases in which a tract covered by an unperfected bona fide claim, or by patent, is included within the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record, or issuing the patent to cover the tract selected: Provided further, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, etc., are complied with on the new claims, credit being allowed for the time spent on the relinquished claim."

VII.

And thereupon your orator further shows unto your Honors:

That on or about the 2nd day of February, 1904, the said Edwin B. Perrin did, in accordance with the provisions and requirements of the act of Congress of June 4, 1897, set forth in paragraph VI of this amend-

ed complaint, relinquish and convey unto the United States of America those certain tracts of land hereinbefore described in paragraph III of this amended complaint, and recorded the deed of conveyance in the office of the recorder of the county in which the said lands are situated, and subsequently, and on the 8th day of February, 1904, filed with the Register and Receiver of the United States land office at Lakeview, Oregon, the said deed so recorded, together with a full, true and correct abstract of title of the lands so relinquished, duly certified as such by the county recorder of the county in which the lands are situated, which abstract of title showed him to be the owner in fee simple of said lands, free and clear of any lien or incumbrances, immediately prior to the time the deed to the United States was recorded, and thereupon and at the same time selected in lieu of said lands so relinquished,

> Lot four, section two, township thirty-seven south, range ten east of the Willamette Meridian,

together with other lands, which selection so made was prior in time to the selection or entry of any other person or persons whomsoever, and, by virtue of said selection, there was initiated a right and interest prior in time and superior in right as against all persons whomsoever.

VIII.

And thereupon your orator further shows unto your Honors:

That regardless of said selection so made as al-

leged in paragraph VII of this amended complaint, the defendant did, on February 12, 1912, attempt to make a homestead entry upon the land described in paragraph VII of this amended complaint.

IX.

And thereupon your orator further shows unto your Honors:

That on or about the 28th day of June, 1902, the State of Oregon, filed upon the said tract so selected, together with certain other lands, certain instruments purporting to be school indemnity lists, which lists were numbered Lists 178 and 188, respectively, which said lists were duly and regularly accepted and filed by the Register and Receiver of the United States land office at Lakeview, Oregon, and thereupon were regularly transmitted to the Commissioner of the General Land Office of the United States government at Washington, D. C., to await the acceptance and approval of the land department of the United States government, but that, owning to the invalid character of the base lands tendered in said lists, the said lists were held for cancellation, and were subsequently cancelled upon relinquishments of said lists filed on behalf of the state of Oregon, on the 8th day of February, 1904.

X.

And thereupon your orator further shows unto your Honors:

That prior to the said cancellation of said school indemnity lists 178 and 188, and before any action whatsoever had been taken by the proper officers of

the land department of the United States, except said Register and said Receiver, relative to the acceptance and rejection of the said indemnity lists, the state of Oregon, acting through the officers of the Oregon state land board, sold to various bona fide purchasers, for value, the timber lands upon which the said school indemnity lists 178 and 188 had been filed, and the said state had not at the time of such sale, nor has it at any time since, ever acquired or owned any right, title, or interest in or to the said lands upon which the said lists were filed, including those lands more particularly described in paragraph V of this amended bill of complaint, which said lands described in said paragraph V were, for a valuable consideration, and in good faith, and without any knowledge whatsoever of the irregularity of the proceedings which had taken place in connection with the sale thereof, or of the invalid character of the base lands which were tendered to the Federal government as the basis for the said selection by the State of Oregon, purchased from the said State of Oregon by the plaintiff herein.

XI.

And thereupon your orator further shows unto your Honors:

That subsequently and upon the discovery of the fact that all the proceedings in connection with the attempt to acquire said lands by filing of said lists 178 and 188, so filed as aforesaid, and more particularly those lands hereinbefore described in paragraph V of this amended bill of complaint, were irregular, and

that by virtue of the filing of said lists the State of Oregon had acquired no interest and did not then have any right, title, or interest in or to the said lands so selected, owing to the invalid character of the base land which had been tendered in exchange therefor, and the further fact that the said selected land had, nevertheless, been sold by the state of Oregon to many innocent purchasers for value, the state of Oregon, acting through the Honorable George E. Chamberlain, its governor, entered into negotiations with the Department of the Interior of the United States, for the purpose of arriving at some arrangement wherein and whereby the interest of these bona fide purchasers from the state might be protected, and as a result of such negotiations, and on or about the 17th day of October, 1903, a letter was promulgated and transmitted to the governor of the state of Oregon by the Honorable Secretary of the Interior of the United States, of which letter the following is in part substantially a copy, to wit:

> "It (the state) may within sixty days allowed for appeal amend its selection by the substitution of a valid base, or if unable to furnish such a base, it may, upon receipt of notice that the selection is held for cancellation, make a formal relinquishment of the selection, and give same to its grantee. While the selection is of record uncancelled the land is segregated thereby, and no right can be acquired by the presentation of an application therefor (29 L. D. 29), but the pur-

chaser holding the state's relinquishment may present it with his application, and thereby secure the right of entry."

XII.

And thereupon your orator further shows unto your Honors:

That thereafter and in accordance with the terms of the arrangement thus agreed upon, as evidenced by the said letter of the Secretary of the Interior, the said lieu selection so made as alleged in paragraph VII of this amended bill of complaint was made by the said Edward B. Perrin, by P. S. Brumby, his attorney in fact, in the interest and for the benefit of the plaintiff herein, and for the purpose of protecting the interests of the plaintiff in and to said selected land acquired by virtue of the purchase so made by the plaintiff from the state of Oregon, as alleged in paragraph X of this amended complaint, and at the time of making said lieu selection so made as alleged in said paragraph VII, and on the 8th day of February, 1904, the said lieu selector, the said Edwin B. Perrin, by P. S. Brumby, his attorney in fact, presented, simultaneously with and together with the selection as in paragraph VII of this amended complaint alleged, a relinquishment from the state of Oregon of all its right, title and interest in and to the said selected land, which said relinquishment was made by the state of Oregon in the interest and for the benefit of the plaintiff herein, as grantee, which relinquishment is the same relinquishment referred to in paragraph IX hereof.

XIII.

And thereupon your orator further shows unto your Honors:

That the said forest lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, was in all respects regular and in accordance with the requirements of said Act of Congress of June 4, 1897, set forth in paragraph VI of this amended complaint, and in accordance with the requirements of the Secretary of the Interior in his letter of October 17th, 1903, hereinbefore set forth in paragraph XI of this amended bill of complaint, and the local officers of the United States land office at Lakeview, Oregon, did, on the 8th day of February, 1904, accept and file the said lieu selection, so made as aforesaid in paragraph VII of this amended bill of complaint, and did, on the 4th day of March, 1904, and at subsequent dates, attempt to reject said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, and stated, as a basis for said attempted rejection, that the said lieu selection was in conflict with certain homestead and timber and stone applications, which were made subsequently to the 8th day of February, 1904, and subsequently to the presentation and filing of the lieu selection, togethether with the relinquishment of the state of Oregon, as alleged in paragraphs VII and XII of this amended bill of complaint.

XIV.

And thereupon your orator further shows unto your Honors:

That subsequently, an on or about the 8th day of April, 1904, said lieu selector and the plaintiff herein, together with other lieu selectors, who had made other selections in the interest and for the benefit of the plaintiff herein, appealed from the ruling of the local officers of the United States land office at Lakeview, Oregon, by which ruling the said local officers attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, upon which appeal the said ruling was affirmed by the Commissioner of the General Land Office at Washington, D. C., on or about the 30th day of March, 1905, and subsequently, and on or about the 25th day of October, 1905, the Honorable Secretary of the Interior of the United States, acting through the Honorable Frank Pierce, first assistant secretary, reversed the said decision and ruling of the Commissioner of the General Land Office, and directed that said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections similarly made, be allowed as of the date on which they were filed, to wit, the 8th day of February, 1904, and directed the Register and Receiver of the United States Land Office at Lakeview, Oregon, to allow said selections to remain of record as filed.

XV.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the 6th day of December, 1905, the local officers of the United

States Land Office at Lakeview, Oregon, attempted to reject the said lieu selection, so made as alleged in paragraph VII of this amended bill of complaint, together with other selections, and alleged as a ground for said attempted rejection that the land covered by said selections had been withdrawn for the purpose of what was known as the Klamath River Project, and said action of the said Register and Receiver of the United States Land Office at Lakeview, Oregon, in attempting to reject said selections, was subsequently reversed by order and direction of the Commissioner of the General Land Office, made on the 23rd day of January, 1906, who ordered and directed that said lieu selection be allowed as of date February 8, 1904.

XVI.

And thereupon your orator further shows unto your Honors:

That on or about the 5th day of March, 1906, and the 11th day of June, 1906, the Register and Receiver of the United States Land Office at Lakeview, Oregon, made objections to the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, and attempted thereby to reject said lieu selection referred to in paragraph VII of this amended complaint, which attempted objections were sustained on appeal by the Commissioner of the General Land Office and by the Department of the Interior, on the 20th day of June, 1906, and subsequently and on or about the 15th day of May, 1907, the Department of the Interior

of the United States recalled its attempted decision of June 20, 1906, and entered an order directing the allowance of the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, as of the date on which said lieu selections were filed, to wit, the 8th day of February, 1904, and ordered and directed that notice of such order be given to all parties who had made entries upon said lands subsequently to the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, which said notice was duly given as directed.

XVII.

And thereupon your orator further shows unto your Honors:

That subsequently, and as a result of the notice so given, a petition for a review of the departmental decision last referred to was filed on behalf of Archie Johnson, a claimant of part of the said lands embraced by said indemnity lists 178 and 188, which petition set forth the existence of an alleged conspiracy, averred to have been formed for the purpose of acquiring all of the said lands, in the first instance, and that the said lieu selections, so made as aforesaid, were in accordance with, and constituted a part of, said alleged conspiracy, and that the plaintiff herein was not a purchaser in good faith of said land described in paragraph V of this amended complaint, or any part thereof, which petition for review was allowed, upon the ground that all previous hearings before the Department of the Interior, so had as herein-

before alleged, were purely ex parte and were, consequently, not proper proceedings in which to determine the merits of the adverse claims to the lands in question, for the purpose of basing a final decision thereon, and, therefore, an order was made directing that a final hearing should be held before the Register and Receiver of the United States land office at Lakeview, Oregon, for the purpose of determining the respective merits of various claims to the lands embraced within the said school indemnity lists 178 and 188.

XVIII.

And thereupon your orator further shows unto your Honors:

That subsequently, and on or about the 25th day of May, 1908, said hearing so ordered, as aforesaid, was duly and regularly had before the Register and Receiver of the United States land office at Lakeview, Oregon, the plaintiff herein appearing in person and by attorneys, and the defendant and other adverse claimants appearing in person or by attorneys, at which time the said Register and Receiver, after duly hearing the respective parties ,attempted to hold that the various homestead and timber and stone entries hereinbefore referred to in paragraph XIII of this amended complaint and particularly the entry of the defendant which was made on the 12th day of February, 1912, should be allowed, which decision was subsequently, and on or about the 13 day of April, 1909, reversed by the Honorable Commissioner of the General Land Office, who held that the lieu se-

lection referred to in paragraph VII of this amended complaint, together with other selections made in the interest of the plaintiff herein, had been duly and regularly made, and should be allowed to remain intact, upon the records of the United States Land Office, as of the date on which they were filed, to wit, February 8, 1904.

XIX.

And thereupon your orator further shows unto your Honors:

That subsequently and on or about the ..... day of ....., 19....., an appeal from the decision of the Honorable Commissioner of the General Land Office, hereinbefore referred to in paragraph XVIII of this amended complaint, was taken by certain alleged homestead and timber and stone claimants, including defendant, to the Department of the Interior of the United States, which department, acting through the Honorable Frank Pierce, its First Assistant Secretary, found that the said lieu selection, so made as alleged in paragraph VII of this amended complaint, together with other selections, were filed simultaneously with the relinquishment and cancellation of said indemnity lists 178 and 188, to wit, on the 8th day of February, 1904, and before the attempted filing of the said alleged homestead and timber and stone entries, so made as alleged in paragraphs VIII and XIII of this amended complaint, and further found that the record then before said department fully showed, and every material fact supported the conclusion, that the plaintiff here-

in was a purchaser in good faith, free from fraud of any kind, and that the said alleged homestead and other entries, and particularly the entry of the defendant, were made subsequently to the 8th day of February, 1904, and after the filing of the lieu selection, so made as alleged in paragraph VII of this amended complaint, and that said lieu selection, so made as alleged in paragraph VII of this amended complaint, had been allowed by the Secretary of the Interior, as alleged in paragraphs XIV and XVI of this amended complaint, and had been allowed by the Commissioner of the General Land Office, as alleged in paragraph XV of this amended complaint, and, based upon said findings, held that it was within the competency of the officers of the land department of the United States to allow the said alleged homestead and timber and stone entries to be made after the filing of said lieu selection, so made as alleged in paragraph VII of this amended complaint, and the allowance of said selections, so made as alleged in paragraphs XIV and XV and XVI of this amended complaint, and further held that said lieu selections, so made and allowed, would be denied in all instances where the local officers of the United States Land Office at Lakeview, Oregon, had attempted to allow homestead and timber and stone entries to be made a copy of which decision is hereunto attached and marked "Exhibit A," and, by reference, incorporated in and made a part of this amended complaint.

XX.

And thereupon your orator further shows unto

your Honors:

That subsequently, and on or about the..... day of ....., 19....., and in accordance with the ruling of the decision hereinbefore referred to in paragraph XIX of this amended complaint, a patent to the following described land, situated in the County of Klamath and State of Oregon, and particularly described as follows, to wit:

> Lot four, section two, township thirty-seven south, range ten east of the Willamette Meridian,

was issued in the name of Andrew J. Manning, the defendant herein, contrary to, and in violation of, the rights and equities of the plaintiff herein, and that the said patent so issued, as aforesaid, was issued by the officers of the United States government without regard to, and in contravention of, the vested rights of the plaintiff herein, and in accordance with the ruling of the Department of the Interior, as evidenced by the decision referred to in paragraph XIX of this amended complaint.

XXI.

And thereupon your orator further shows unto your Honors:

That this is a suit between citizens of different states, and that the amount in controversy herein exceeds the amount of three thousand ($3000) dollars, exclusive of interest and costs.

XXII.

And thereupon your orator further shows unto your Honors:

That he has no plain, adequate, or speedy remedy at law, but only in equity.

WHEREFORE, and forasmuch as your orator is remediless in the premises, under and by strict rules of common law, and can only have relief in a court of equity where matters of this nature are recognizable and reviewable, files this, his amended bill of complaint, and prays:

I. That the defendant may be adjudged and decreed to hold said land described in paragraph V in trust for your orator, and to convey the same to your orator, and deliver to your orator any patent or other deeds of the same in his possession, and be restrained and enjoined from hereafter setting up any claim or title to said land, or any part thereof, or in any manner intermeddling therewith, or removing any timber or other product therefrom.

II. That the defendant may be adjudged and decreed to hold any timber or other product by him or his servants or agents removed from said land, or the proceeds or manuafactured product from the same, in trust for your orator, and may be decreed to account to your orator for the same, or the value thereof, and to repay to your orator said value, with interest from the date of sale, if the same has been sold by the said defendant.

III. That upon the failure of the defendant to

make said conveyance and to deliver to your orator any patent or other deeds of the said land described in paragraph V, within a period of thirty days from the entry of the decree of this court, the said decree be adjudged and decreed to stand as a conveyance in lieu of such patent or other deeds.

IV. And your orator further prays: That your Honors may grant unto your orator a writ of subpoena of the United States issued out of and under the seal of this Honorable Court, directed to the defendant, Andrew J. Manning, therein and thereby commanding said defendant, under a certain penalty therein to be named, personally to be and appear before your Honorable Court, then and there to answer, all and singular, (but not under oath, answer under oath being expressly waived), the matters and things aforesaid, and to stand and abide by and sustain such direction and decree as shall be made herein, as to your Honors shall seem equitable and just.

V. And your orator prays for such further relief in the premises as the nature and circumstances of this cause may require and to your Honorable Court may seem reasonable and proper.

And your orator, as in duty bound, will ever pray.

A. D. DANIELS,

By Platt & Platt and Hugh Montgomery, his Solicitors.

Hugh Montgomery,
of Counsel.

[Exhibit "A"]

D. C. M. G. B. G.

DEPARTMENT OF INTERIOR.

Washington, Feb. 17, 1910.

E--900.

Aztec Land & Cattle Company, Lt'd.
E. B. Perrin
Lieu Selectors,
A. D. Daniels,
Claimant of Beneficial Interest,
vs.
Archie Johnson, et al,
Intervenors.
The Commissioner
Of the General Land Office.

Sir:

This is the appeal of Archie Johnson, et al., intervenors, from your office decision of April 13, 1909, sustaining the claim of A. D. Daniels, beneficiary under Lieu Selections, Nos. 15016, 15017 and 18, (Serials 0714, 0715, 0716) for certain described lands in the Lakeview Land District, Oregon. Questions affecting the validity of these selections have been subject of numerous decisions of the Land Department, and a detail statement of such proceedings covering a period of more than eight years, must of necessity be set out

in detail, if the issues now presented may be properly understood.

January 28, 1902, the lands involved were selected by the State of Oregon, per school indemnity lists Nos. 178 and 188 these lists were held for cancellation by your office, because of invalid base, and were finally cancelled in March and August, 1904, upon relinquishments filed on behalf of the state. The date of the filing of these relinquishments is one of the disputed questions in this record: and while not necessarily controlling, it is in view of this case important, and will be considered on its merits in the progress of this paper.

For present statement, it will be enough to say that the local officers and your office have found that it was filed Feb. 10, 1904, whereas it is claimed on behalf of A. D. Daniels, owner of the Beneficial interest in certain Forest Lieu Selections of these same lands, that it was filed Feb. 8, 1904. However this may be, the Forest Lieu Selections in question were filed on said last named date Feb. 8, 1904, but were rejected by the local officers in a letter to one, L. T. Barin, March 4, 1904, for conflict with certain homestead and timber and stone applications for part of the same lands, These Forest Lieu Selections were filed by Barin in the name of Edward B. Perrin, and Aztec Land and Cattle Co. but the said A. D. Daniels was the beneficial owner of the scrip, which was filed in his interests to protect his purchase from the state under its aforesaid Invalid Indemnity Selections.

On appeal, your office affirmed the action of the

Register and Receiver, giving as further reason and justification thereof the fact, that the Lieu Selections were presented at the local land office prior to cancellation of said Indemnity School Selections, and even prior to the filing of the state's relinquishment. Upon appeal, however, from this action of your office, the Department, Oct. 25, 1905, reversed your office decision, stating while the appeal was pending an affidavit had been filed by A. D. Daniels in which he stated that he was the real party in interest and the equitable owner of the lands assigned as bases for the Lieu Selections; that after its selections of the lands as School Indemnity, the State of Oregon had sold them to sundry purchasers, who paid part of the purchase price and assigned the certificates of sale to him, and he was then the owner thereof; that he thereafter became doubtful as to the validity of the State selection, and in order to protect his interests obtained relinquishments from the State and caused them to be filed in the Local Land Office at Lakeview with Lieu Selections; that in so doing he relied upon your office report of Oct. 13, 1904, (1903) to the Secretary of the Interior; which report was transmitted by the Department to the Governor of Oregon Oct. 17, 1904 (1903).

Considering the appeal, the Department held that the case, was controlled by its decision in the California and Oregon Land Company, (33 L. D. 595), that this case was in all essential respects the same as that one, and remanded the case with directions to adjudicate it thereunder. The Lieu Selections having

been returned to the Register and Receiver for allowance in accordance with said decisions, they were again, on Dec. 6, 1905, rejected by the local officers, for the reason that the lands had been withdrawn by telegram of June 25, 1904, for the Klamath River project. This action of the Register and Receiver was reversed by your officer Jan. 23, 1906, and the selections were remanded to be entered of record as of date Feb. 8, 1904, the day on which they were originally presented, if no other objection appeared. Under dates of March 5, and June 11, 1906, the Register submitted full reports to your office upon the said applications; and stated there were objections to the allowance of the same, in that there were various homesteads and timber and stone applications which had been allowed subsequently to the cancellation of the state's list. The Register also referred to the fact that Daniels had caused a contest to be instituted against the State's selection, and questioned his good faith in the matter.

Separate appeals were taken by the Aztec Land and Cattle Company and Perrin from this action of the local officers, and the papers in connection with the application of the Aztec Company were transmitted to the Department by your office, letter of May 9, 1906, for further consideration in connection with the report of the local office.

Upon consideration of the matter thus presented, the Department held in its decision of June 26, 1906, that the facts failed to show that Daniels, was entitled to protection as a Bona Fide purchaser from the

state; that the State's selections were filed Jan. 28, 1902, while the lands were sold on Jan. 21st, preceding, at which they were public lands of the United States, and no one purchasing them could claim to be a Bona Fide purchaser from the State; that as late as Oct. 5, 1903, Daniels was not asserting that he was a purchaser in good faith from the State, but was acting adversely to it and attempting to contest the lists under which he later asked for recognition as a Bona Fide purchaser and for equitable relief; that this position then was inconsistent with the position later assumed: and if had since acquired assignments of the State's certificates of sale, he had done so with full knowledge of the invalidity of the State's claim; that the facts set forth above were fatal to his contention that he was a Bona Fide purchaser, and as such should be permitted to file the State's relinquishment and obtain precedence over others seeking to appropriate the lands under the General land laws; that to conceed to him this privilege under letters Oct. 17 & 13, 1903, mentioned above, would in effect, be to make such persons as from time to time might constitute the State Land Board, agents to dispose of the public lands of the United States, within the State, to such persons as they might favor by means of sales of public land as state land, the subsequent filing of the State's list invalid for want of sufficient base; the filing of the State's relinquishment, and the protection of the purchaser from the state by grace of the Land Department. The Department accordingly held in that decision that the lieu selection should be rejected.

A motion for review of said decision of June 26th, 1906, having been filed by Daniels, Department, on May 15 and 18, 1907, rendered decisions holding that while Daniels, was not, strictly speaking a Bona Fide purchaser from the State, because the Certificates of sale issued by the State antedated the filing of the School Indemnity Selections, and therefore were made at a time when there was no actual claim of the State pending, still Daniels had not purchased the land until the month of April, 1902, nearly three months after the lands had been actually selected by the State, and that having paid a valuable consideration for the lands in an honest belief that a title was being obtained, that was sufficient to constitute a Bona Fide Purchase.

The decision of June 26th, 1906, was therefore recalled, and it was ordered that the Lieu Selection should be reinstated.

In promulgating the decision last mentioned, your office returned the Lieu Selections to the Local Land Office for allowance, and instructed the Register and Receiver to notify all parties who had made entry of said lands subsequently to the cancellation of the State's list to show cause within sixty days why their entries should not be cancelled, because of conflict with said Lieu Selections as a result of which a petition termed, a motion for re-review of Departmental decisions of May 15, and 18, 1907, was filed on behalf of Archie. Johnson who claimed a part of the Lands under a sale made thereof under the Public Land Laws.

This petition or motion charged, in effect, that a conspiracy had been formed for the purpose of acquiring the lands originally by means of the State's selection involved: that the entire proceeding by which title was sought to be acquired was fraudulent, and that the parties thereto should not be allowed to perfect title to the lands, to the injury of those who in good faith had entered the same under the public land laws.

Considering this petition, the Department stated in its decision of August 10th, 1907, that its previous decisions had been ex parte, and that the last decision favorable to Daniels did not prevent your office ordering a hearing, or taking other action with respect to the disposition of the claims of others which might be materially affected by the re-instatement of the claim of Daniels; and the case was accordingly remanded to your office for further consideration, to the end that a full and thorough investigation might be made into the matter, and your office was expressly advised that the previous decisions of the Land Department should in no wise embarass your action in the premises.

A hearing was accordingly ordered; and after due notice to all parties concerned, that the same was had before the local land office, May 25, 1908, Daniels appearing in person and by attorney, and the other parties claiming an interest either in person or by an attorney. The Local Land Office found that the case was not similar in all respects to that of the California and Oregon Land Company cited above; that in

that case there were no intervening rights or equities of other parties, while in the case under consideration the lands had been entered by bona fide settlers or purchasers, to many of whom final certificates had issued and in some instances even Patents had been issued.

The Register and Receiver accordingly recommended that the Homestead and Timber and Stone Entries of the various parties in the case should be allowed to remain in tact. Daniels appealed to your office, whereby your said decision of April 13, 1909, the action of the Local Office was reversed, and it was held that the Lieu Selections should remain in tact.

An appeal on behalf of the Homestead and Timber and Stone claimants brings the case before the Department. Most of the applicants to purchase the lands from the State upon whose supposed initiative these selections were made were not persons in being, but were fictitious persons, usually designated as "Dummies."

But while this is so, there is no evidence in this record showing or tending to show, that Daniels, or any person in privity with him, in fact, was a party to or had any knowledge of the intended fraud; and every material fact in this record supports the conclusion that Daniels bought in good faith, the Certificates of sale issued by the State. He had never heard of these State's Selections until one McHale, a timber land speculator of whom he had no personal acquaintance, but who was known to him by reputation, had reported to him that there was a large body of timber

land for sale, at Klamath, Oregon; and upon McHale's representations, he constituted McHale his agent under powers which amounted to, co-partnership, and McHale went to Klamath Falls to fully investigate these lands and the title thereto. McHale had instructions from Daniels, among other things, to secure the services of an attorney upon the question of title.

He did so. The attorney after an examination of the certificates of sale, reported that the title was good, and McHale's inquiries into the character of the land being satisfactory the results of his investigations was reported to Daniels and the deal was closed, upon the payment by Daniels of $23,901.10 for the certificates, of sale, and the further payment to the State of the unpaid ballance of the purchase price thereon, amounting to $3,033.74. Daniels had no personal acquaintance with any of the parties to the transactions; and so far as it appears from this record, he had no knowledge, information or belief which should have caused him to question the bona fides, of the people with whom he was dealing, or cause him to suspect that there was irregularity in the transaction. Nor was there anything in his connection with subsequent events, in his efforts to acquire title to these lands which may reasonably be said to go to the good faith of his purchase. It appears that rumors were soon thereafter rife with reference to land frauds in Oregon in connection with its school land grant.

The rumors reached Daniels and he promptly investigated them, finding for the first time that his title was questionable, upon the advice of his attorney, he initiated a contest against the State's selections upon which his title rested, hoping thereby to protect his purchase by acquiring an equitable preference right.

As a result of this contest, the state refunded the money which he had paid it and put in the hands of his attorney a relinquishment to the United States of all rights under its selections. Daniels then caused said relinquishments to be filed in the District Land Office, together with the Lieu Selections. There was certainly nothing reprehensible in this proceeding. Moreover, it was taken upon certain suggestions made in your said report of October 13, 1903. This report was responsive to a letter from the Governor of Oregon, September 28, 1903, wherein the inquiry was made of this department as to the means of protecting bona fide purchasers of the school indemnity lands from the State in instances where the State's selections had been cancelled for invalid base. Your offices reported among other things, and this is the same report transmitted to the Governor of Oregon, Oct. 13, 1903, that as to such selections—

while the selection is of record and uncancelled, the land is segregated thereby, and no right can be acquired by the presentation of an applicaiton therefor (29 L. D. 29), but the purchaser holding the State's relinquishment may present it with his application and thereby secure right of entry.

This is also the plain holding of this Department in the
in California and Oregon Land Company, supra, and is precisely the course pursued by Daniels in this case. His contest against the State's selection was to that end. He secured the State's relinquishments and presented them with the aforesaid applications to scrip the land.

It is true the record shows that the relinquishments were not marked, filed, in the local office until Feb. 10, 1904, which was two days after the presentation of the scrip applications.

It is further shown that it was the custom in that office to note the filing of the relinquishments of entries and filings upon public lands on the same day they were received in the office; and a clerk in said office gives it as his opinion that if these relinquishments had been receved on February 8, instead of February 10, the filing would have been noted on the day they were received.

But it is evident from the facts and circumstances surrounding the incident that the scrip applications and the State's relinquishments were, in fact, filed simultaneously.

The filing was by mail, and the letter of transmittal was written by Daniel's attorney, the said L. T. Barrin.

The letter recites that it contains the relinquishments in question, and it was received at the local land office February 8. Moreover, the action of the local officers at the time in rejecting the proffered

scrip applications, is put upon the ground that part of the lands were covered by pending homestead and timber and stone applications, whereas if the State had not then relinquished its school indemnity selections, the local officers would surely have assigned this as the reason for rejection of said applications, because this reason would have applied to all of the lands involved, instead of only a small portion of them, as was the case with the reason assigned.

It is worthy of too, that there has not been found any correspondence or record which would indicate that if the said Barin, had left these relinquishments out of his letter by inadvertence, they were ever afterwards transmitted to the local land office, and no correspondence or record of correspondence showing that if he had been guilty of such inadvertence he was ever advised thereof by the local officers.

I conclude therefore, on this branch of the case that the relinquishments in question and the scrip applications were filed at the same time, as was suggested they might be, in your office report of September 28th, 1903, above quoted.

Under existing regulations, it was the duty of the Register and Receiver to forward these applications, and these relinquishments without action for the consideration and disposition of your office. This however, it has been seen, was not done.

The scrip applications were rejected, and the history of the case, hereinbefore set out, shows that these applications were kept alive by successive appeals,

and that the case was twice remanded to the local officers, with directions to allow the applications, but various reasons were assigned for the neglect or failure of the local officers to obey these instructions.

It is believed that these applications might have been allowed, not as a matter of right, but in the discretion of the Secretary of the Interior; and if the instructions of the Secretary had been carried out, it would have been done before the case became complicated by the counter-equitable considerations arising upon the unfortunate allowance of the Homestead and Timber and Stone entries for most of these lands. It is thought however, that in instances where the land department has permitted these entries and filings to go of record, where they have become closed transactions, the Department would not be justified in cancelling such entries and filing, for the purpose of protecting the equities of Daniels in these lands. It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so, Daniels will not now be heard to question the correctness of that disposition.

See Hoyt vs. Weyerhauser et al). (161 F. E. D., Rep., 324).

It appears however, from your office reports of Dec. 16, 1909, that there are approximately 107 quarter Sections of land involved in this case. Of these, twenty-eight are involved in homestead entries, four

in cash entries and homestead entries, twenty-four in cash entries, twenty-five in Timber and Stone sworn statements, twelve are free and unappropriated, eight of them do not appear to be covered by the Lieu Selections in question, and seven of them have been patented.

In view of what has been said, the claim of Daniels must be denied as to all of them except those covered by Timber and Stone sworn statements only, and those that are unappropriated, amounting to what seems to be, from your office reports, approximately thirty-seven quarter sections in all.

As to these lands, the Timber and Stone applicants have not put themselves in privity with the United States, and the Land Department has not entered in to such Contract with them as to preclude other disposition of the lands.

See Campbell vs. Weyerhauser et al (161 Fed. Rep., 332).

This being true, and believing that the equities of Daniels should be protected to the fullest extent consistent with equitable administration, I have to direct that the Scrip applications be allowed as to all tracts which have not been otherwise disposed of, and rejected as to such as now appear to be covered by Homestead and cash entries.

The decision appeal from is modified. The papers are herewith returned.

Very respectfully,

FRANK PIERCE,

First Assistant Secretary.

Enclosures.

[Endorsed]: Amended Bill in Equity. Filed May 17, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 1 day of July, 1912, there was duly filed in said Court, a Demurrer, in words and figures as follows, to wit:

[Demurrer to Amend Bill of Complaint.]

In the District Court of the United States in and for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

ANDREW J. MANNING,

Defendant.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF OREGON:

Demurrer of the above named defendant, Andrew J. Manning, to the amended bill of complaint of the above named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said amended bill.

And for cause of demurrer shows:

I.

That it appears by the plaintiff's own showing by the said amended bill that he is not entitled to the re-

lief prayed by the said amended bill against this defendant.

II.

That the said amended bill of complaint of the plaintiff is wholly without equity.

Wherefore, and for divers other good causes of demurrer appearing on said amended bill, this defendant demurs thereto, and he prays the judgment of this Honorable Court whether he shall be compelled to make further or any answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in his behalf sustained.

ARTHUR I. MOULTON,
H. M. MANNING.

STATE OF OREGON,
County of Multnomah—ss.

I, Arthur I. Moulton, being first duly sworn, on oath say: That I am one of solicitors for defendant, Andrew J. Manning, in the within entitled suit; that in my opinion the foregoing demurrer is well founded in point of law, and the same is not interposed for the purpose of delay.

ARTHUR I. MOULTON,

Subscribed and sworn to before me this 28th day of May, 1912.

[Seal.] M. E. SNEDECOR,
Notary Public for Oregon.

[Endorsed]: Demurrer. Filed July 1, 1912.
A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 15 day of July, 1912, the same being the 12 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to wit:

[Decree.]

In the District Court of the United States in and for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

ANDREW J. MANNING,

Defendant.

This cause having come on regularly to be heard by the court upon the demurrer of the defendant to the amended bill of complaint of the above named plaintiff, and the defendant having appeared by his attorneys, Arthur I. Moulton, and H. W. Manning, and the plaintiff having appeared by his attorneys Messrs. Platt & Platt and Hugh Montgomery, and the court having heard the arguments of counsel for the respective parties hereto, and having taken said cause under advisement, and fully considered the same, and being now fully advised in the premises, and it appearing to the court that said demurrer is well taken and should be in all respects sustained, and that said amended bill of complaint is without equity, and should be dismissed,

It is therefore ordered, considered, adjudged and

decreed by the court that the said demurrer to said amended bill of complaint be, and the same is hereby, in all respects sustained, and that said amended bill of complaint be, and the same is hereby dismissed, and that said defendant have and recover of and from said plaintiff his costs and disbursements herein, taxed at $.....

Dated this 15th day of July, 1912.

R. S. BEAN,
Judge.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition for Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,
Plaintiff,

vs.

ANDREW J. MANNING,
Defendant.

The above named plaintiff, conceiving himself aggrieved by the order and decree made and entered in the above entitled cause on the 15th day of July, 1912, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, papers, and proceedings and

all things concerning the same, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon his filing a bond for the payment of all damages and costs if he fails to prosecute the said appeal to effect, which bond shall act as a supersedeas bond.

A. D. DANIELS,

By Platt & Platt and Hugh Montgomery, Solicitors for Plaintiff.

Hugh Montgomery,

of Counsel.

[Endorsed]: Petition for Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, Assognments of Error, in words and figures as follows, to wit:

[Assignments of Error.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

ANDREW J. MANNING,

Defendant.

Now on this 29th day of August, 1912, comes the above named plaintiff, A. D. Daniels, appearing by .

Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record and says that in the record and proceedings of the above entitled court in the above entitled cause and in the final order and decree entered therein on the 15th day of July, 1912, there is manifest error and that said order and decree is erroneous and against the just rights of said plaintiff and for error the said plaintiff assigns the following:

I.

Because the above entiled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff, on the 8th day of April, 1904, made a valid forest lieu selection of the lands described in paragraph V of plaintiff's amended bill filed in said cause under and in accordance with the provisions of the Act of Congress of June 4th, 1897, set forth in paragraph VI of plaintiff's amended bill of complaint.

II.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the forest lieu selection of the plaintiff made upon the lands described in paragraph V of his amended bill of complaint was prior in time to and initiated a right and interest superior to the claim of any person or persons whomsoever and particularly the defendant.

III.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the attempted homestead entry of the defendant was subsequent in time and inferior in right to the forest lieu selection of the plaintiff.

IV.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the forest lieu selections of the plaintiff had been approved by the proper officers of the United State government, which approval gave the plaintiff a vested interest in the land so selected.

V.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the alleged homestead entry of the defendant was made in contravention of the vested rights of the plaintiff herein.

VI.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff was equitably entitled to be protected in the forest lieu selections which he had made on the lands described in paragraph V of his amended bill of complaint, as against the claims of the defendant or any person or persons whomsoever.

VII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that by the admissions of the demurrer the plaintiff was equitably entitled to have the defendant declared a trustee for the plaintiff of the lands described in paragraph V of his amended bill of complaint.

VIII.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint in that it did not hold that the bill of complaint stated a good cause of action to which the defendant should be required to file his answer or plea.

IX.

Because the above entitled court erred in sustaining the demurrer to plaintiff's amended bill of complaint and decreeing that said amended bill of complaint be dismissed and allowing costs to the defendant.

WHEREFORE, the plaintiff and appellant prays that the decree of said court be reversed and such directions be given that full force and efficacy may enure to the plaintiff by reason of the cause of suit set up in his amended bill of complaint filed in said cause and that a decree be entered in accordance with the prayer of plaintiff's amended bill of complaint.

PLATT & PLATT and HUGH MONTGOMERY,

Hugh Montgomery,

of Counsel.

[Endorsed]: Assignment of Errors. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, an Order Allowing Appeal, in words and figures as follows, to wit:

[Order Allowing Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

ANDREW J. MANNING,

Defendant.

This day came A. D. Daniels, plaintiff, appearing by Messrs. Platt & Platt and Hugh Montgomery, his solicitors of record, and presented his petition for an appeal and an assignment of errors accompanying the same, which petition, upon consideration of the court, is hereby allowed, and the court allows an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon the filing of a bond in the sum of $500 with good and sufficient surety to be approved by the court; and

It is further ordered that said bond shall act as a supersedeas bond; and

It is further ordered that a certified transcript of the record, and all proceedings herein be forthwith

transmitted to the said United States Circuit Court of Appeals.

R. S. BEAN,
Judge.

Dated this 29th day of August, 1912.

[Endorsed]: Order Allowing Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 29 day of August, 1912, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,
Plaintiff,

vs.

ANDREW J. MANNING,
Defendant.

KNOW ALL MEN BY THESE PRESENTS:

That we, A. D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Andrew J. Manning in the full and just sum of five hundred ($500) dollars to be paid to the said Andrew J. Manning, his executors, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally by these presents;

Sealed with our seals this 29th day of August, A. D., 1912.

WHEREAS, lately at the District Court of the United States for the District of Oregon, in a suit pending in said court between A. D. Daniels, plaintiff, and Andrew J. Manning, defendant, a decree was rendered against said plaintiff, A. D. Daniels, and said A. D. Daniels having petitioned an appeal and filed a copy thereof in the clerk's office in said court to reverse the same in the aforesaid suit, and a citation directed to the said Andrew J. Manning, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be holden in the city of San Francisco in said Circuit, on the 28th day of September, A. D. 1912, having been served on said defendant;

NOW, the condition of this obligation is such, that if the said A. D. Daniels shall prosecute his appeal to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

A. D. DANIELS,
By Platt & Platt, His Solicitors of Record.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

[Seal.] By HARRISON G. PLATT,
Attorney in Fact.
By W. J. CLEMENS.

Examined and approved this 29th day of August, 1912.

R. S. BEAN,
District Judge.

[Endorsed]: Bond on Appeal. Filed Aug. 29, 1912.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 30 day of August, 1912, there was duly filed in said Court, a Citation on Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

A. D. DANIELS,
Appellant,

vs.

ANDREW J. MANNING,
Appellee.

UNITED STATES OF AMERICA,
Ninth Judicial Circuit—ss.

TO ANDREW J. MANNING, GREETING:

WHEREAS, A. D. Daniels, appellant in the above entitled suit has lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from a decree lately rendered in the District Court of the United States for the District of Oregon, made in favor of you, the said Andrew J. Manning, and has filed the security required by law; you are therefore hereby cited to appear before the said Unit-

ed Stated Circuit Court of Appeals at the City of San Francisco, state of California, on the 28th day of September, next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the City of Portland in the Ninth Judicial Circuit this 29th day of August, in the year of our Lord, one thousand nine hundred twelve.

R. S. BEAN,
Judge of the District Court of the United States.

UNITED STATES OF AMERICA,
District of Oregon—ss.

Due service of the within Citation to Appellee by certified copy thereof as required by law is hereby acknowledged at Portland, Oregon, this 30th day of August, 1912.

ARTHUR I. MOULTON,
of Attorney for Appellee.

[Endorsed]: Citation to Appeal. Filed Aug. 30, 1912.

A. M. CANNON,
Clerk U. S. Dist. Court.

And afterwards, to wit, on Saturday, the 28 day of September, 1912, the same being the 77 Judicial day of the Regular July, 1912, Term of said Court; Present: the Honorable R. S. BEAN, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time to File Record.]

In the District Court of the United States for the District of Oregon.

A. D. DANIELS,

Plaintiff,

vs.

ANDREW J. MANNING,

Defendant.

No. 5515.

September 28, 1912.

Now, at this day, for good cause shown, it is ORDERED that the plaintiff's time for filing and docketing the record on appeal in this cause in the United States Circuit Court of Appeals, Ninth Circuit, be and the same is hereby enlarged and extended ninety (90) days from this date.

R. S. BEAN,

Judge.

No. 2226

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

A. D. DANIELS,

Appellant,

vs.

ANDREW J. MANNING,

Appellee.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

At a stated term, to wit, the October term, A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2226.

A. D. DANIELS,

Appellant,

vs.

ANDREW J. MANNING,

Appellee.

Order of Submission in U. S. Circuit Court of Appeals.

ORDERED, appeal in the above-entitled cause argued by Mr. Hugh Montgomery, counsel for the appellant, and by Mr. Arthur I. Moulton, counsel for the appellee, and submitted to the Court for consideration and decision.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

A. D. DANIELS,

Appellant,

vs.

JESSIE E. WAGNER,

Appellee.

Opinion U. S. Circuit Court of Appeals.

PLATT & PLATT and HUGH MONTGOMERY, for the Appellant.

ANGELL & FISHER, F. H. MILLS, ARTHUR I. MOULTON and P. A. LAFFERTY, for the Appellees.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

The decision in this case involves the merits of sixteen suits pending in this court on appeal, in all of which A. D. Daniels, the appellant, was the complainant in the court below. The object of each suit was to obtain a decree declaring the defendants therein holders of the legal title to the land described in each case as trustees for said complainant. Demurrers to the bills for want of equity were sustained, and from the decrees thereupon rendered dismissing the bills, the appeals are taken.

The allegations in the bills are substantially the same. In the case which is above-entitled the allegations are in substance the following: That on and prior to April 12, 1902, Edward B. Perrin and the

Aztec Land & Cattle Company, Ltd., a corporation, each owned certain lands in fee simple in the Territory of Arizona; that on that date those lands were included within the limits of the San Francisco Mountains Forest Reserves, and that thereafter, on February 2, 1904, under the provisions of the Act of Congress of June 4, 1897, the said land owners relinquished and conveyed to the United States their interest in said lands, and on February 8, 1904, they made lieu selections of certain public lands in Klamath County, Oregon, for the benefit of the complainant; that the selections were perfected by presenting the recorded deed, together with a full, true and correct abstract of title showing that the selectors were the owners in fee simple of the lands relinquished; that on or about June 28, 1902, the State of Oregon had filed upon the lands so selected certain instruments purporting to be school indemnity lists, and before the approval of the lists, had sold the lands to the complainant, but that thereafter, owing to the invalid character of the base lands tendered in said lists, the lists were held for cancellation, and in March and August, 1904, were finally cancelled and relinquishments of said lists were filed on behalf of the State of Oregon; that prior to such cancellation, the State of Oregon acting through the officers of the State Land Board, sold to various *bona fide* purchasers for value the timber lands upon which the said school indemnity lists had been filed, and that the appellant in good faith purchased the said lands from the State of Oregon; that thereafter, discovering that the State had no right, title or interest in

said lands so conveyed, the forest lieu selections already referred to were made for the purpose of protecting complainant's interest in said lands; that at the time of making their selections, the selectors filed with their selections relinquishments from the State of Oregon of any rights which it might have acquired by virtue of the school indemnity lists so filed by it; that after making such lieu selections and filing such relinquishments, the officers of the Land Office at Lakeview, Oregon, having allowed other entries to be made upon the lands so selected by homestead, timber and stone applications for the lands, rejected the selections so made by the complainant's predecessors in interest; that upon appeal to the Commissioner of the General Land Office, the action of the Register and Receiver at Lakeview was affirmed; that the Commissioner advanced as a further reason for the rejection that at the time when the lieu selections were presented at the local land office, the State indemnity school selections had not been cancelled or relinquished; that the State of Oregon executed relinquishments and the same were filed in the Land Office, bearing the file-mark of February 10, 1904; that the relinquishments were forwarded to the Commissioner of the General Land Office, and on March 7, 1904, he advised the Register and Receiver at Lakeview that the relinquishments had been received, and directed them to make due notation that the lists were cancelled, "leaving the lands open to entry by the first legal applicants"; that thereafter the appellee made application for the land at the local land office, and his filing was accepted; that thereafter various

proceedings were had in the Land Department, concerning the land so entered, and on August 10, 1907, the Secretary of the Interior instructed the commissioner to order a hearing, that a full investigation might be had of the whole matter; that upon the hearing the local land office found that the lands had been entered by *bona fide* settlers or purchasers, to many of whom certificates, and in some instances, patents had issued; that the Register and Receiver accordingly recommended that such entries be allowed to remain, and the Secretary of the Interior finally so decided on February 17, 1910, holding that the greater equities were with the Homestead and Stone and Timber entrymen, and that in the discretion of the Secretary, such entries might be protected against the right of the scrip applications, and said: "It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons, and having done so, Daniels will not now be heard to question the correctness of that disposition."

GILBERT, Circuit Judge, after stating the case:

The appellant contends that by virtue of his offer to select the lands in question, and the tender in exchange therefor of a deed and abstract of title to the lands offered for surrender, he thereby became the equitable owner of the lands so sought to be selected, notwithstanding that his selection was rejected by the officers of the local land office, and that their rejection was affirmed by the Secretary of the Interior,

and that the patent having issued to the appellees, when in equity and good conscience, and according to law, it should have gone to the appellant, the Court should convert the holder of the legal title into a trustee for the appellant, and compel conveyance of the legal title to him.

In considering, in the light of the adjudications, the question here presented, it is essential to bear in mind the distinction between the right acquired by a Railroad Company, under a congressional grant of lands to aid the construction of a railroad, to select within the indemnity limits lands in lieu of those which are lost in the place limits, and the right of a lieu land selector under the Act of June 4, 1897. The former is a substantial right in the lands lying in the indemnity limits, given in consideration of the construction of a railroad, and is confined to specific lands within certain boundaries which are defined in the grant. It is a vested right, of which the grantee could not be deprived, by an Act of Congress or by other authority. In Weyerhaeuser vs. Hoyt, 219 U. S. 387, the Court declared that it was the intention of Congress in making such a grant, "to confer a substantial right to land within the indemnity limits in lieu of land lost within the place limits." The right of selection of lieu land given under the Act of June 4, 1897, however, is in the first instance but an offer by the Government to exchange lands. It is based upon no valuable consideration actually received. It attaches to no specific lands, nor to lands within any defined limits. It does not attach upon the mere presentation of the requisite papers. It at-

taches only when the authorized officers of the Government accept the offer to exchange. Nor is it true that the filing of the lieu selection papers and the acceptance of the same by the local Land Office segregates the land upon which the filing is made so as to cut off intervening and subsequent rights as against the lieu selectors. In Roughton vs. Knight, 219 U. S. 537–547, in construing the Act of June 4, 1897, the Court said: "Manifestly there must be an acceptance of the relinquishment by someone authorized to decide upon its sufficiency, and an assent to the particular selection made in lieu." In Cosmos Exploration Co. vs. Gray Eagle Oil Co., 190 U. S. 310, lieu land had been selected under the Act of June 4, 1897. The selector complied with the provisions of the Act. His selection was received and accepted, and entered on the records of the local land office. At that time there was no adverse claim. Before the issuance of a patent, the selector's grantee brought a suit against the defendants, who had entered the land as a mineral claim, he claiming that his grantor had become vested with the complete equitable title to the land so selected, and had become entitled to receive a patent. The Court held that it had no jurisdiction prior to the issuance of the patent, to determine who was entitled to receive it, and that under the Act of June 4, 1897, the officers of the local land office had no authority to decide whether the selector had complied with the provisions of the Act, that authority being vested in the Commissioner of the General Land Office. The Court said: "But even the complete equitable title asserted by a complainant must,

as it would seem, be based upon the alleged right of the local land officers to accept the deed and approve the selection, even though such approval may be thereafter the subject of a review in the nature of an appeal from the action of the local officers. There must be a decision made somewhere regarding the rights asserted by the selector of land under the Act before a complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the statute, and the selector cannot decide the question for himself. We do not see how it can be successfully maintained that without any decision by any official representing the Government, and by merely filing the deed relinquishing to the Government a tract of forest reserve land, and assuming to select a similar area of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land." It is urged that this language of the Court is *dictum*, but we do not so regard it. It contains the reasoning of the Court in determining the nature of the rights of the complainant in that case. But if, indeed, it is true that the expression of such views was unnecessary to the determination of the case which was before the Court, the language used sets forth the mature and unanimous judgment of the members of that court on the question of law which is involved in the case at bar, and we deem it controlling in the decision of the present case.

Nor do we find ground to sustain the appellant's contention that the views of the Court so expressed

in the Cosmos Exploration Company case have been modified by the decision in Weyerhaeuser vs. Hoyt, 219 U. S. 380. That was a case which involved the right of a railroad company to select lands within the indemnity limits of its grant. The Court held that selections of lieu lands filed with the Secretary of the Interior excluded the right of others to appropriate the lands embraced therein pending action by the Secretary, and that the railroad company's rights to such lieu lands so selected were superior to those of a purchaser under the Timber and Stone Act who filed pending final decision by the Secretary, and that the final decision by the Secretary related back to the date of the original selections. Prior to that time, the Court had said, in New Orleans Pacific Ry. Co. vs. Parker, 143 U. S. 57: "As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected by the grantee and approved by the Secretary of the Interior." The same was held in Humbird vs. Avery, 195 U. S. 507. In Wisconsin Central Ry. Co. vs. Price County, 133 U. S. 496, 512, the Court said: "Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title"; and in Sjoli vs. Dreschel, 199 U. S. 565, the Court held it to be established doctrine "that no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior; that up to the time such approval is given, lands within indem-

nity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and, That the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road." In the Weyerhaeuser case, the Court distinguished the Sjoli case by saying that it belonged to a class of cases in which there was no question of right by relation involved, and that the general language which we have quoted from the opinion was to be considered in view of the questions which were presented in that case, and that to apply it in the Weyerhaeuser case would be in effect to destroy the indemnity provisions of the Granting Act. No reference was made to the decision in the Cosmos Exploration Company case, and this was evidently for the reason that the language of the Court in that case was deemed to be applicable solely to the right of selection granted by the Act of June 4, 1897, and that the Court recognized and intended to reaffirm the vital distinction which it had found between such rights and the rights of a selector of indemnity lands under a grant to a railway company in aid of the construction of its road. Stalker vs. Oregon Short Line, 225 U. S. 142, is in line with Weyerhaeuser vs. Hoyt and so is Svor vs. Morris, 227 U. S. 524. We consider the decision in the Cosmos Exploration Company case authority for sustaining the decree of the

court below. But there is additional ground for sustaining it in the fact that, at the time when the appellant's selection was initiated on February 8, 1904, the lands involved herein appeared upon the records of the local land office as selected by the State of Oregon by certain school indemnity lists, and that those lists were not relinquished by the state until February 10, 1904. This sufficiently appears from the decision of the Secretary of the Interior, which is made an exhibit to the bill and is controlling in so far as it varies from the allegations of the bill. Greenameyer vs. Coate, 212 U. S. 434, 443.

The decree in each of the sixteen suits, Nos. 2212–2227, is affirmed.

[Endorsed]: Filed May 5, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2226.

A. D. DANIELS,

Appellant,

vs.

ANDREW J. MANNING,

Appellee.

Decree, U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the District Court of the United

States for the District of Oregon, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered May 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Petition for Allowance of Appeal to Supreme Court of the United States.

PETITION FOR APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES.

The above-mentioned appellant, A. D. Daniels, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit and that a decree has therein been rendered, on the fifth day of May, A. D. 1913, affirming the decree of the District Court of the United States for the District of Oregon, and that the matter in confroversy in said suit exceeds one thousand dollars, besides costs; that this cause is one

involving the construction and application of a statute of the United States, to wit, Act of June 4, 1897, 30 Statutes at Large, 36 (U. S. Comp. Stats. 1901, p. 1541), and in which the decree of the United States Circuit Court of Appeals for the Ninth Circuit is not final, and is a proper cause to be appealed to the Supreme Court of the United States.

The above-named appellant, conceiving himself aggrieved by the decree made and entered in the above-entitled court and cause on the fifth day of May, 1913, does hereby appeal from said decree to the United States Supreme Court, for the reasons specified in the assignment of errors, which is filed herewith.

WHEREFORE, the said appellant prays that an appeal be allowed him in the above-entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Ninth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors, herewith filed by the said appellant, may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

PLATT & PLATT,
Solicitors for Appellant.

[Endorsed]: Filed Jun. 2, 1913. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Title of Court and Cause.]

Assignment of Errors on Appeal to Supreme Court of the United States.

COMES NOW the appellant, A. D. Daniels, by Platt & Platt, his solicitors, and says that in the record and proceedings herein there is manifest error, and assigns error thereto as follows:

The United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the decree of the United States District Court for the District of Oregon sustaining the demurrer of appellee to appellant's amended bill of complaint and dismissing appellant's amended bill of complaint:

First. Because the demurrer to appellant's amended bill of complaint admits that on the 8th day of February, 1904, the appellant made a valid forest lieu selection of the land, described in paragraph V of appellant's amended bill filed in said cause, under and in accordance with the provision of the Act of Congress of June 4, 1897, set forth in paragraph VI of appellant's amended bill of complaint.

Second. Because the demurrer to appellant's amended bill of complaint admits that the forest lieu selection of appellant, made upon the lands described in paragraph V of his amended bill of complaint, was prior in time and initiated a right and interest superior to the claim of any person or persons whomsoever, and particularly to that of the appellee.

Third. Because the demurrer to appellant's amended bill of complaint admits that the attempted homestead entry of the appellee was subsequent in

time and inferior in right to the forest lieu selection of appellant.

Fourth. Because the demurrer to appellant's amended bill of complaint admits that the forest lieu selections of appellant had been approved by the proper officers of the United States Government, which approval gave appellant a vested interest in the land so selected.

Fifth. Because the demurrer to appellant's amended bill of complaint admits that the alleged homestead entry of the appellee was made in contravention of the vested rights of the appellant herein to the land described in paragraph V of appellant's amended bill of complaint.

Sixth. Because the demurrer to appellant's amended bill of complaint admits that the appellant was equitably entitled to be protected in the forest lieu selection which he had made on the lands described in paragraph V of his amended bill of complaint as against the claims of the appellee, or any person or persons whatsoever.

Seventh. Because the demurrer to appellant's amended bill of complaint admits that the appellant was equitably entitled to have the appellee declared a trustee, for the appellant, of the lands described in paragraph V of appellant's amended bill of complaint.

Eighth. Because the demurrer to appellant's amended bill of complaint admits that the Oregon school indemnity lists, covering the lands described in paragraph V of appellant's amended bill of complaint, were relinquished simultaneously with the fil-

ing of the forest lieu selections by appellant.

Ninth. Because the demurrer to appellant's amended bill of complaint admits that the relinquishments of the Oregon school indemnity lists were filed on February 8, 1904.

Tenth. Because the appellant's amended bill of complaint stated a good cause of suit to which the appellee should have been required to file his answer or plea.

Eleventh. Because the decree of said District Court should have been reversed and the demurrer to appellant's amended bill of complaint overruled.

WHEREFORE, the appellant prays that the decree of the United States Circuit Court of Appeals for the Ninth Circuit be reversed, and such directions be given that force and efficacy may inure to the appellant by reason of the cause of suit set up in his amended bill of complaint filed in said cause, and that a decree be entered in accordance with the prayer of appellant's amended bill of complaint.

PLATT & PLATT,
Solicitors for Appellant.

[Endorsed]: Filed Jun. 2, 1913. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Title of Court and Cause.]

Order Allowing Appeal to Supreme Court U. S. and Fixing Amount of Bond.

IT IS HEREBY ORDERED, that the appeal in the above-entitled case to the Supreme Court of the

United States be, and the same is hereby, allowed as prayed.

AND IT IS FURTHER ORDERED that the amount of the appeal and supersedeas bond be, and the same hereby is, fixed at $500.00.

Dated this 3d day of June, 1913.

WM. B. GILBERT,
United States Circuit Judge, Ninth Circuit.

[Endorsed]: Filed Jun. 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Bond on Appeal to Supreme Court U. S.

KNOW ALL MEN BY THESE PRESENTS, that we, A. D. Daniels, as principal, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Andrew J. Manning, in the full and just sum of Five Hundred Dollars ($500), lawful money of the United States of America, to be paid to the said Andrew J. Manning, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Sealed with our seals this 3d day of June, 1913;

WHEREAS, the appellant in the above-entitled suit is prosecuting an appeal to the United States Supreme Court to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Ninth Circuit on the 5th day of May, 1913;

NOW, THEREFORE, the condition of this obligation is such, that if the said appellant shall prosecute said appeal to effect, and answer all damages and costs if he fails to make said appeal good, then this obligation shall be void; otherwise to remain in full force and effect.

A. D. DANIELS. [Seal]
By PLATT & PLATT,
His Solicitors of Record.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, [Seal]
By ROBERT T. PLATT,
Attorney in Fact.
CHESTER W. HANSEN,
Agent.

Examined and approved this 3d day of June, 1913.
WM. B. GILBERT,
Circuit Judge for the Ninth Circuit.

[Endorsed]: Filed Jun. 5, 1913. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Praecipe for Record on Appeal to Supreme Court of the United States.

To the Clerk of the said Court:

Sir: Please issue a certified Transcript of the Record on appeal to the Supreme Court of the United States in the above-entitled cause, consisting of the following:

1. Copy of Printed Transcript of Record on which case was heard in the Circuit Court of Appeals, to

which will be added a Copy of the following-entitled papers that were filed, and of the Proceedings that were had in said Circuit Court of Appeals, viz.:

2. Order of Submission;

3. Opinion;

4. Decree;

5. Petition for Appeal to Supreme Court U. S.; and Order thereon;

6. Bond on Appeal to Supreme Court U. S.;

7. Assignment of Errors;

8. Praecipe for Certified Transcript of Record on Appeal to Supreme Court U. S.;

9. Certificate of Clerk U. S. C. C. A. to Transcript of Record on Appeal to Supreme Court U. S., and

10. Original Citation on Appeal to Supreme Court U. S.

PLATT & PLATT,
Solicitors for Appellant.

United States of America,
Ninth Judicial Circuit,—ss.

Due service of the within Praecipe for Transcript on Appeal to Supreme Court U. S. is hereby acknowledged, and certified copy thereof received, at Portland, Oregon, this 7th day of June, 1913.

ARTHUR I. MOULTON,
Of Solicitors for Appellee.

[Endorsed]: Filed Jun. 10, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2226.

A. D. DANIELS,

Appellant,

vs.

ANDREW J. MANNING,

Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record on Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-nine (69) pages, numbered from and including one (1) to and including sixty-nine (69), to be a full, true and correct copy of the complete record in the above-entitled cause, prepared pursuant to praecipe therefor filed by counsel for the appellant, including all proceedings had therein, and including the Opinion and the Assignment of Errors filed therein, as the same remain on file and appear of record in my office, and that the same, together, constitute the Transcript of Record in said cause on Appeal to the Supreme Court of the United States.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twentieth day of June, A. D. 1913.

[Seal] F. D. MONCKTON,

Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2226.

A. D. DANIELS,

Appellant,

vs.

ANDREW J. MANNING,

Applicant,

Citation on Appeal to Supreme Court U. S.

United States of America,
Ninth Circuit,—ss.

To Andrew J. Manning, Greetings:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, sixty (60) days after the date of this citation, pursuant to an appeal filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein A. D. Daniels is appellant and you are appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable W. B. GILBERT, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 6th day of June, A. D. 1913.

WM. B. GILBERT,
Circuit Judge.

United States of America,
Ninth Judicial Circuit,—ss.

Due service of the within citation to appellee is hereby acknowledged, and certified copy thereof received, at Portland, Oregon, this 7th day of June, 1913.

ARTHUR I. MOULTON,
Of Solicitors for Appellee.

[Endorsed]: No. 2226. In the United States Circuit Court of Appeals for the Ninth Circuit. A. D. Daniels, Appellant, vs. Andrew J. Manning, Appellee. Citation. Filed Jun. 10, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed on Cover.]

File No. 23,828.

U. S. Circuit Court Appeals, 9th Circuit.

Term No. 677.

A. D. DANIELS, Appellant,

vs.

ANDREW J. MANNING.

Filed August 2d, 1913.

File No. 23,828.

DANIELS *v.* MERRITHEW.

SAME *v.* SACKVILLE.

SAME *v.* MESERVEY.

SAME *v.* JOHNSON.

SAME *v.* MANNING.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 237, 238, 245, 246, 247. Argued April 21, 22, 1915.—Decided June 1, 1915.

Decided on authority of *Daniels* v. *Wagner*, *ante*, p. 547.

An assertion that one seeking to exchange lands under the Forest Reserve Act of June 4, 1897 is not entitled to make the exchange is devoid of merit where the bill shows that the Secretary expressly found that the applicant had acted in good faith.

205 Fed. Rep. 235, reversed.

THE facts are stated in the opinion.

Mr. Harrison G. Platt, with whom *Mr. Robert Treat Platt* and *Mr. Hugh Montgomery* were on the brief, for appellant.

Mr. A. W. Lafferty, with whom *Mr. P. A. Lafferty*, *Mr. H. M. Manning* and *Mr. Arthur I. Moulton* were on the brief, for appellees.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

These five cases were among the fourteen referred to in the opinion in *Daniels* v. *Wagner*, No. 239, just de-

cided, *ante*, p. 547. For the appellant they were argued in the brief which was filed in No. 239 and which was stated to be applicable to the other fourteen cases. But for the appellees a brief was filed applicable to these five cases. In this brief nothing is said to maintain the existence of the discretionary power under which the Land Department acted and which we have decided in No 239 was not possessed, the brief stating that the subject is irrelevant because the correctness of the action of the Land Department and the court below in sustaining the demurrers is maintainable on other grounds, as follows:

1. Because of the failure of the lieu entrymen to file in time the relinquishment made by the State of Oregon and the assumed resulting priority of the rights of the other entrymen over those of the lieu entrymen. But this contention is governed by the ruling made in No. 239 on the same subject, since we directed attention to the specific finding of the Secretary of the Interior to the contrary and pointed out its binding force.

2. In addition various propositions are urged concerning the bad faith of Daniels in buying the right to the land from the State and the assumption, based upon this premise, of his want of right to the relinquishment or to use it in order to clear away the supposed impediment on the land record to the allowance of the lieu entries. But even assuming for the sake of argument that the premise of fact upon which this contention proceeded had any real relevancy to the right of the lieu entrymen to acquire the land and to use the relinquishment to enable them to do so, such premise is devoid of merit because of the express finding of the Secretary of the Interior which we have stated in the opinion in No. 239 that Daniels' good faith in the Oregon transaction was established. It is true that the argument in these cases in an indirect way seemingly assails the cor-

rectness of this finding, but as it is conclusive here nothing more need be said on that subject.

It results that these cases both as to law and the facts are disposed of by the opinion expressed in No. 239. The decrees sustaining the demurrers in these cases are therefore reversed and they are remanded for further proceedings in accordance with the opinion in this and in *Daniels* v. *Wagner, ante,* p. 547.

Reversed.